85-1982

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

CHASE RIVELAND, Executive Director,
Colorado Department of Corrections,

Petitioner,

vs.

RICHARD LEE BALL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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ISSUES PRESENTED FOR REVIEW

1. May federal circuit courts circumvent the exhaustion requirement in habeas corpus cases, inject new issues, and deny a state an opportunity to present evidence and argument thereon, by merely citing a case which the parties had cited for a totally different proposition?

2. What type of constitutional infirmity renders a conviction so unreliable that it may not be used in a subsequent proceeding to enhance punishment?

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OPINIONS BELOW

The unreported opinion of the Colorado Court of Appeals is included as Appendix A; the Recommendations of the United States Magistrate are included as Appendices B and C; the Order of the United States District Court for the District of Colorado is included as Appendix D; the Opinion of the United States Court of Appeals for the Tenth Circuit is reported, *sub nom. Ball v. Ricketts*, 779 F.2d 578 (10th Cir. 1985) and is included as Appendix E;[1] and the denial of the Petition for Rehearing is included as Appendix F.

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JURISDICTION

The judgment of which review is sought is the Opinion of the United States Court of Appeals for the Tenth Circuit, which was issued on December 16, 1985. Rehearing was denied on March 4, 1986. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254. Review of this case is sought because the United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; because the circuit court has decided a federal question in a way which conflicts with applicable decisions of this court; and because the circuit court has decided an important question

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[1]Mr. James G. Ricketts has been replaced by Mr. Chase Riveland as Executive Director of the Colorado Department of Corrections. Sup. Ct. R. 40.3.

of federal law which has not been, but should be, decided by this Court. Sup. Ct. R. 17.1(a) and (c).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, section 9 of the United States Constitution provides in pertinent part:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Amendment V of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Amendment VI of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Amendment XIV of the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254, which concerns federal habeas corpus review of state decisions, is included as Appendix G.

Colo. Rev. Stat. 16-13-101(2) (1978) provides:

> *Punishment for habitual criminals.* Every person convicted in this state of any felony, who has been three times previously convicted, upon charges

separately brought and tried, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony, shall be adjudged an habitual criminal and shall be punished by imprisonment in the state penitentiary for the term of his or her natural life. Such former convicton or convictons and judgment or judgments shall be set forth in apt words in the indictment or information. Nothing in this part 1 shall abrogate or affect the punishment by death in any and all crimes punishable by death on or after July 1, 1972.

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STATEMENT OF THE CASE

On September 30, 1957, respondent Richard Lee Ball appeared at a providency hearing in the Denver District Court. The respondent told the court that he was 17 years old, although it appears that he was actually 16. The respondent's parents were not present; he informed the court that they knew he was in jail, and were not taking any steps to obtain an attorney. Because of his "tender years," the court stated that it would proceed cautiously to make certain that the respondent understood that he had a right to talk with a lawyer. The court advised him of his right to counsel five times, explained that it had a duty to appoint counsel if he was indigent, and reiterated later that it would appoint an attorney at state expense if the respondent was without funds. Five times the respondent waived his right to counsel on the record. The court informed the respondent that he would be waiving certain

constitutional rights by his plea, and also explained the possible sentences. The court read the charge to the respondent and summarized it in one short phrase: "The charge is burglary." The respondent persisted in his plea of guilty, which finally was accepted by the court.

The respondent's application for probation filed in the district court contained an admission that he, his girlfriend, and some friends had decided to break into the Barnum Creamery on West 1st Avenue in Denver. The respondent had broken a window, entered the premises, found some cigarettes in a cabinet, and threw 20 or more cartons out to his friends.

Twenty-one years later, in 1978, the respondent was charged with four counts of theft, theft by receiving, conspiracy, and habitual offender. He contested the validity of the prior convictions underlying the habitual criminal charges. In particular, he argued that the 1957 guilty plea was constitutionally infirm because he did not understand the nature of the charge and because he did not voluntarily waive counsel. He did not testify concerning the 1957 guilty plea, and the trial court, after examining the transcript of the providency hearing, found that the 1957 plea was valid. The respondent was found to be a habitual criminal after trial to a jury, and was sentenced to life imprisonment under Colo. Rev. Stat. 16-13-101(2) (1978).

The respondent appealed this conviction. While the appeal was pending, he filed a *pro se* motion in the Denver District Court for post conviction relief pursuant to Colo. R. Crim. P. 35(c), again challenging the validity of the

1957 conviction. At the hearing on the motion, at which the respondent was represented by counsel, he testified that after his arrest in 1957, he did not call his parents from jail; he did not understand the meaning of "indigent",[2] although he understood that the court would appoint counsel if he did not have enough money to afford one; he did not request an attorney because he did not want to involve his father, despite the fact that his father had made it clear to him that he would pay for any legal expenses incurred by his son; he did not understand the charge when it was read to him; he did not understand the elements of burglary; and he pled guilty because he wanted to get one of the codefendants, his girlfriend, out of jail by taking all of the blame himself. He admitted that he had been caught inside the creamery.

The trial court found that the plea advisement met with the standards required in 1957; that the respondent understood what was going on in the court at the time he entered his plea of guilty; that he understood the nature of the charge of burglary; and that the plea was intelligent and voluntary. The respondent's appeal of this ruling was consolidated with the appeal of his conviction as a habitual criminal.

On appeal, the respondent alleged that his 1957 conviction was invalid because (1) there was no determination on the record that he understood the nature and elements of the charge, (2) he was incompetent to waive counsel as a matter of law because he was a juvenile, and

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[2]The respondent defined "indigent" as "A person with no finances or places to sleep or go to; like a wino."

(3) he did not understand the meaning of the word indigent, and thus did not understand his right to appointed counsel. The Colorado Court of Appeals rejected these arguments, and the Colorado Supreme Court denied his Petition for Writ of Certiorari on September 13, 1982.

On November 16, 1982, the respondent filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Colorado, raising the same issues that had been raised in the state courts. The case was referred to a United States Magistrate, who conducted two hearings, and filed two Recommendations. The Magistrate found that the state courts failed to consider all of the facts, and that the advisement was not sufficient; he concluded that the respondent did not understand the charge, and did not voluntarily waive his right to counsel. The Magistrate recommended that the petition be granted. On December 20, 1983, the Federal District Court granted the Petition for Writ of Habeas Corpus, stating only that the court had reviewed the file and had come to the same conclusion as the Magistrate. The respondent was subsequently released.

The petitioner appealed the district court's order to the United States Court of Appeals for the Tenth Circuit, arguing that the Magistrate's fact finding was unwarranted and that his factual and legal conclusions were erroneous. On December 16, 1985, the Tenth Circuit affirmed the district court's order. It did so, however, not on the basis of any issue raised or argued before it or before any of the state or federal courts, but by retroactively applying *In Re Gault*, 387 U.S. 1 (1967) and ruling that in 1957, due process required that the record must

demonstrate that a juvenile criminal defendant's parents were notified in writing of the charges against him. *Ball v. Ricketts,* 779 F.2d at 581. In his Petition for Rehearing, the petitioner pointed out that the issue of whether the parental notice requirement of *In Re Gault* should be applied retroactively to this case, which was not a juvenile delinquency proceeding, had *never* been raised in any way and was not exhausted. The Petition for Rehearing was denied on March 4, 1986, with the notation that one judge would grant rehearing.

Recently, the respondent has been charged by three Colorado jurisdictions with two counts of theft, one count of possession of a controlled substance, four counts of burglary and one attempted burglary, two counts of aggravated robbery and violent crime, and two counts of habitual criminal, all allegedly committed since his release by the federal district court. He is incarcerated in Arizona, pending extradition to Colorado.[3]

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REASONS TO ALLOW THE WRIT

This case raises two important questions. The first concerns the failure to provide the state with a fair opportunity to litigate an issue, and the second, the limits of collateral attack of convictions used in a subsequent proceeding to enhance punishment.

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[3]The state, of course, cannot be certain of conviction, or certain that any conviction obtained will not be later overturned on appeal, or in a habeas corpus proceeding; thus, the state retains a strong interest in vindicating the conviction and sentence at issue here in order to protect the public from a dangerous recidivist.

1. By injecting new factual and legal issues into this case, the circuit court has denied the state the opportunity to present available evidence and legal argument, and to have a full, fair hearing; the action is such a departure from the accepted course of proceedings in habeas corpus cases that it demands an exercise of this Court's power of supervision.

The exhaustion requirement is an integral part of the federal habeas corpus statute, required by comity and common sense. In fact, the exhaustion requirement existed long before it was codified by Congress as part of 28 U.S.C. § 2254: since the nineteenth century, federal courts have refused to consider habeas corpus claims until after the state courts have had an opportunity to act upon them, in recognition of the fact that the good relations between the state and federal courts, both equally bound to guard and protect the rights secured by the Constitution, should not be disturbed by unnecessary conflict. *Rose v. Lundy*, 455 U.S. 509 (1982). It is not enough that the factual allegations made to the federal courts are the same ones made to the state courts; exhaustion requires that *constitutional claims* made to the federal courts be the same as the ones presented to the courts of the state. *Picard v. Connor*, 404 U.S. 270 (1971). Where, as here, a new constitutional issue is injected by a circuit court, a failure to exhaust results. *Picard v. Connor, supra.*

The Tenth Circuit noted that the respondent "has not specifically focused his legal arguments to either the federal or state courts on the specific right to parental notice. . . ." *Ball v. Ricketts*, 779 F.2d at 581 n. 2. Never-

theless, the court considered this claim to have been fairly presented to the state courts, because *In Re Gault* was cited by the parties in their briefs, and by the Colorado Court of Appeals in its decision.

The court's finding of exhaustion pays empty homage to form: in the prior proceedings, *In Re Gault* was cited by both counsel and the courts *only* for the obvious proposition that, since 1967, juveniles in juvenile delinquency proceedings have a right to counsel, and that that right can be waived. See, *e.g.,* Appendix A, Opinion of the Colorado Court of Appeals, at page 2. At every stage of the proceedings, the respondent challenged the validity of the 1957 guilty plea on the grounds that he did not understand the nature of the charge, or his right to appointed counsel. He never alleged or argued that *In Re Gault* created a due process right to parental notice, applied to *criminal* cases involving juveniles, or applied retroactively; he never argued that a juvenile cannot waive the right of parental notice. Consequently, the petitioner never had the opportunity to present evidence or legal argument on these issues, and the courts of the State of Colorado never had an opportunity to consider them. The failure to exhaust is particularly egregious here because evidence does in fact exist which proves that the respondent's parents had actual notice that he was in jail, but chose to leave him there in the hope that the discipline

would prove beneficial to him. This evidence is contained in his 1957 probation report.[4]

One practical reason for exhaustion is that cases which have been fully exhausted will more often be accompanied by a complete factual record to aid the federal courts in its reivew. *Rose v. Lundy*, 455 U.S. 509 (1982). Here, the circuit court drew improper inferences from its assumption of facts, stating that the failure to notify the respondent's parents may well have affected the ultimate outcome of the case, because had officials notified his parents of his arrest, it "seems like the parents would have taken some action to assist him." *Ball v. Ricketts*, 779 F.2d at 581. Given the opportunity, the petitioner could have proven that the parents *were* notified, and that the effect of this notice was null: Immeditely after his two prior arrests, the parents had bailed the respon-

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[4]The full 1957 probation report contains a statement by the respondent's mother that she knew her son was in jail, but that she and his father decided to allow him to remain there for disciplinary reasons. The full probation report was not presented to the state courts in the 1978 proceedings. The respondent's attorney attached only the respondent's application for probation to his state court pleadings. The petitioner's counsel attached the full 8-page probation report to the Objections to Magistrate's Findings filed on August 10, 1983. Respondent's counsel objected to the use of the full report. Petitioner's counsel knew that the respondent's admission of the elements of burglary was included in the first two, uncontested pages, and that the only additional information in the contested six pages was the mother's statement. Not wishing to add another issue to the case, and in the belief that the mother's statement was in no way crucial to the case as presented, petitioner's counsel agreed not to refer to the final six pages. When the record was designated for the later appeal to the Tenth Circuit, the final six pages were dropped from the copy of the Objection of August 10, 1983 which became part of the record.

dent out of jail; however, they had come to believe that this had not served his best interests. After this arrest, they decided to allow him to remain in jail. Actual notice had no effect on the outcome of this case.

In addition, the ruling of the circuit court suggests myriad legal questions which the petitioner never had an opportunity to argue and which the state courts never had an opportunity to consider: whether *In Re Gault* created a due process right to parental notice; if so, whether the juvenile can waive the notice requirement, and if so, whether the respondent's statement to the court in 1957 that his parents knew that he was in jail constituted a waiver; whether the right to parental notice applies to juveniles tried as adults;[5] if so, whether a failure to notify parents, standing alone, constitutes such a denial of due process in all circumstances that it must invalidate a prior predicate conviction;[6] and whether the right to parental notice should be applied retroactively.[7] The failure to

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[5]The Fifth Circuit has been unable to find such a due process right, see *Adams v. Wainwright,* 455 F.2d 832 (5th Cir.), *cert. denied,* 404 U.S. 860 (1971).

[6]Another panel of the Tenth Circuit has held that a failure to notify parents in a juvenile proceeding does not necessarily constitute reversible error, even on direct appeal, absent a showing of prejudice or willful disregard of the right by the government. *United States v. Watts,* 513 F.2d 5 (10th Cir. 1975).

[7]The majority of courts have determined that the juvenile's right to counsel is not retroactive, *see, e.g., McRae v. State,* 88 Wash. 2d 307, 559 P.2d 563 (1977). Counsel has found no case applying the right to parental notice retroactively.

exhaust has denied the petitioner his opportunity to contest all of these obviously disputable legal issues.

Even if the doctrine of exhaustion did not exist, it is fundamentally unfair to the State of Colorado and to the petitioner to inject these issues after the opportunity to offer evidence and present legal argument has passed; the state and the petitioner have been denied their opportunity for a full and fair hearing. The Tenth Circuit has deprived the state of this opportunity on an extremely tenuous basis, ignoring this Court's firm policy which has been expressed in many contexts, of restraint and respect for the decision-making processes of the states. *See Rose v. Lundy,* 455 U.S. 509 (1982); *Sumner v. Mata,* 455 U.S. 591 (1982) (Sumner II); *Sumner v. Mata,* 449 U.S. 72 (1977) (Sumner I); *Wainwright v. Sykes,* 433 U.S. 72 (1977); *Picard v. Connor,* 404 U.S. 270 (1971). Clearly, the Tenth Circuit has chosen to ignore the teachings of this court, perhaps feeling secure in the knowledge that petitions for certiorari are seldom granted, regardless of merit. This Court's Writ of Certiorari is necessary here to remind the federal courts that the issue of federal-state relations is of paramount importance and that federal court rulings running contrary to the spirit of proper deference to state's rights will be considered particularly suspect and appropriate for further review by this Court.

2. The Tenth Circuit's opinion has raised an additional issue which this Court has skirted but never addressed directly: what type of constitutional infirmity renders a conviction so unreliable that it may not be used later to enhance punishment? In *Burgett v. Texas,* 389

U.S. 109 (1967), this Court refused to allow a prior conviction, which was constitutionally infirm due to the denial of the defendant's right to counsel, to be used to enhance punishment in a subsequent proceeding. Later cases have emphasized that the prior conviction may not be used, not merely because it is subject to attack, and not even because it is subject to attack on constitutional grounds, but because a prior conviction obtained without counsel or a valid waiver of counsel is inherently *unreliable. Loper v. Beto,* 405 U.S. 473 (1972); *Baldasar v. Illinois,* 446 U.S. 222 (1980).[8]

These cases indicate that this court has begun to shape a policy that predicate convictions may not be relied upon to enhance punishment where they are subject to attack on constitutional grounds which render them inherently unreliable; conversely, predicate convictions subject to attack only on grounds which do not negate reliability, may be used by the state to enhance later punishment. This case presents an opportunity to further develop this area of the law.

A collateral attack many years after a conviction is not the equivalent of an immediate direct appeal; a different balance must be struck. It is one thing to base an

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[8]All of the cases but one have involved the right to counsel; the sole exception is *Marshall v. Lonberger,* 459 U.S. 422 (1983), where the defendant alleged that he entered a guilty plea in the mistaken belief that he was pleading guilty to a completely different crime. *Marshall v. Lonberger,* 459 U.S. at 443. However, this Court did not reach the issue of whether this type of infirmity would render the resulting conviction inherently unreliable.

initial incarceration on a defective conviction, quite another to use a reliable but technically deficient conviction to more seriously punish a repeat offender, who has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail. *Cf. Rummell v. Estelle,* 445 U.S. 263, 278 (1980). Where the predicate conviction is reliable, even though arguably subject to constitutional attack, then society's substantial interest in the finality of its decisions and in increased punishment for recidivists should prevail. *Cf. Stone v. Powell,* 428 U.S. 465 (1976).

The state's interest in the finality of its decisions is almost too obvious to bear discussion: the judicial process becomes a mockery of itself if it is forever open to appeals, reconsideration, and the possibility of reversal many years after the fact on grounds which to the populace appear to be legal technicalities; such a system cannot deter crime or rehabilitate offenders, whose attention remains focused upon their private war with society and upon their ultimate vindication, rather than upon becoming functioning and contributing members of society; finally, continual review in a frantic search for any possible error wastes very scarce judicial resources and costs an immense amount of money. Burger, *Speech To The American Bar Association,* Houston, Texas, February 8, 1981; Bator, *Finality in Criminal Law And Federal Habeas Corpus For State Prisoners,* 76 Harv. L. Rev. 441 (1963).

The Tenth Circuit Court of Appeals here ruled that the 1957 guilty plea was infirm, based upon the court's

unique application of *In Re Gault*. The 1957 plea was one of the three predicate felonies required to support the respondent's conviction under the state habitual criminal statute; this conviction was set aside. There was no finding that the 1957 conviction was unreliable: in fact, the Tenth Circuit commented that, but for the respondent's age and the failure to notify his parents, "we would have little trouble finding that the state court's determinations must be upheld." *Ball v. Ricketts*, 779 F.2d at 580. A lack of notice to parents does not render a criminal conviction inherently unreliable.[9] The Tenth Circuit has reached to invalidate a predicate conviction on a collateral attack, not on the basis of unreliability, not even on the basis of a violation of constitutional rights, but on its singular interpretation of a case which is still a matter of judicial debate.

The important point is not that the Tenth Circuit struck the wrong balance; the real problem is that the law on this very important point is so unclear. Prior convictions are used in criminal courts daily to enhance the punishment of recidivists, yet the state and lower federal courts have not had the guidance of this Court which would allow them to navigate safely the narrow channel between defendants' rights and the rights of society. The Writ of this Court should issue to provide that necessary guidance.

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[9]This case was reviewed by six attorneys, five state court judges, one federal magistrate, and four federal judges before the novel application of *In Re Gault* occurred to anyone; the case clearly does not encompass obvious, fundamental constitutional error which would call into question the reliability of the conviction.

CONCLUSION

The Tenth Circuit's autocratic departure from the letter and spirit of the law of exhaustion has denied the petitioner and the State of Colorado even one fair opportunity to be heard. This Court's Writ should issue in order to instruct the lower federal courts on the paramount importance of the requirement of exhaustion. In addition, this Court's Writ of Certiorari should issue to instruct the state and lower federal courts on what type of constitutional infirmity will suffice to invalidate a conviction for use as a sentence enhancer in a subsequent proceeding.[10]

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[10]If this Court believes that its prior decisions on these issues need no further clarification, then the petitioner requests that the Writ of Certiorari be granted, and that this case be summarily reversed, with directions to the Tenth Circuit to either: (a) purge the *Gault* issue from the case; (b) rescind the writ of habeas corpus and dismiss the case for failure to exhaust state remedies; or (c) remand the case to the federal district court for an evidentiary hearing.

APPENDIX A

COLORADO COURT OF APPEALS
(Filed April 29, 1982)

No. 79CA1153
No. 80CA1121

THE PEOPLE OF THE
STATE OF COLORADO,

Plaintiff-Appellee,

v.

RICHARD LEE BALL,

Defendant-Appellant.

Appeal from the District Court of Jefferson County
Honorable Joseph P. Lewis, Judge

Appeal from the District Court of the City
and County of Denver
Honorable Roger Cisneros, Judge

DIVISION II

Opinion by JUDGE KELLY JUDGMENT AFFIRMED
Enoch, C.J., and Van Cise, J., concur

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The defendant, Richard Lee Ball, appeals his conviction on three habitual criminal counts, and the denial of his Crim. P. 35(c)(2) motion to vacate a 1957 conviction for burglary. The actions were consolidated and we affirm.

After the prosecution rested in his jury trial, Ball entered guilty pleas to three counts of theft and one count of conspiracy to commit theft. Four habitual criminal counts were submitted to the jury, which returned verdicts adjudicating the defendant to be a habitual criminal based on counts 1, 2, and 4. Habitual criminal count 1 concerned a guilty plea to second degree burglary entered on April 27, 1973, with judgment entered on July 2, 1973. Count 2 concerned a 1957 guilty plea to burglary. Count 4 concerned a plea of guilty to assault with a deadly weapon entered on May 7, 1973, with judgment entered on July 16, 1973.

I.

Ball first contends that his 1957 conviction for burglary is invalid because it was obtained in violation of his right to counsel without a valid waiver. We disagree.

Although Ball was entitled to counsel at his arraignment, *Von Moltke v. Gillies,* 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), that right can be waived. *Geer v. Alaniz,* 138 Colo. 177, 331 P.2d 260 (1958). And, despite the fact that Ball was a juvenile at the time of his arraignment, he was competent to waive his right to counsel. *In re Gault,* 387 U.S. 1, 42, 87 S.Ct. 1428, 1451, 18 L.Ed.2d 527, 554 (1967). Waiver of the right to counsel may not be presumed from a silent record. *Burgett v. Texas,* 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). However,

"when the record affirmatively reflects such waiver, the defendant must make a prima facie showing that the waiver was ineffective . . . ." *People v. Gutierrez*, — Colo. —, 622 P.2d 547 (1981).

During Ball's 1957 providency hearing, the trial court informed him of his right to counsel five times, and each time Ball indicated that he wished to proceed without counsel. The trial court further informed Ball of his right to appointed counsel if he were indigent. At his Crim. P. 35(c) hearing, Ball testified that he did not understand the meaning of the term indigent: "I thought indigent—they call the winos indigent in the jail, and I thought they were referring to me as like a person with no finances or place to sleep or go to—like a wino." Since Ball's statement reveals an understanding of the essential character of the term, *see Black's Law Dictionary* at 913 (4th ed.), his argument is unpersuasive.

Ball testified that he had refused an attorney because he had been afraid his parents would ultimately have to pay for it. However, the trial court has no duty to question the motive of the accused who waives his right to counsel. Here, the trial court stated on the record that it would proceed cautiously because of Ball's "tender years," and we conclude that Ball was adequately informed of his right to counsel and that he effectively waived it.

The defendant next contends that his 1957 guilty plea was involuntary because the trial court did not ascertain whether he understood the elements of the crime charged. We disagree.

The law governing the validity of the defendant's plea is that which existed at the time the plea was en-

tered. *People v. Hubbard,* 184 Colo. 243, 519 P.2d 945 (1974). In 1957, a trial judge had no affirmative duty to inform the defendant of the specific elements of the offense charged. *People v. Bucci,* 184 Colo. 367, 520 P.2d 580 (1974); *Hubbard, supra.* The statute which governed providency hearings in 1957 was C.R.S. 1953, § 39-7-8. It required only that the accused be advised of the consequences of his plea and the crime with which he was charged. *People v. Arnold,* 190 Colo. 193, 544 P.2d 968 (1976).

Here, the trial court gave the defendant a copy of the information and read it to him, and all the elements of burglary were present. The trial court fully advised Ball of the possible penalties and the rights he was waiving by pleading guilty. Moreover, the trial court had no indication of possible defenses to the crime, and the factual basis for the plea appeared in the probation report. *Arnold, supra.* Ball testified at his 35(c) hearing that he had chosen to plead guilty in order to take all the blame for the crime and clear his girlfriend. Under the circumstances, the applicable requirements for a voluntary guilty plea were met. *See People v. Brewer,* — Colo. App. —, — P.2d — (No. 81CA0186, announced January 21, 1982).

Ball's final contention regarding his 1957 conviction concerned the jurisdiction of the district court to accept his guilty plea. Ball contends that only the county court had jurisdiction to try cases brought by information, C.R.S. 1953, § 37-8-6, and that the district court lacked jurisdiction absent a minor's request for transfer. C.R.S. 1953, § 37-8-7. Section 37-8-6 provides that the district court and the county court have concurrent jurisdiction, and the general provisions of C.R.S. 1953, § 39-4-1, indicate

that district court jurisdiction is not limited to prosecutions initiated by indictment. Thus, the district court had jurisdiction over Ball in 1957.

II.

Ball was represented by counsel when he pled guilty to second degree burglary pursuant to a plea bargain in 1973. He contends that the guilty plea was not voluntary because the trial court did not fully explain the elements of second degree burglary or ask whether he understood them. We disagree.

While no precise ritualistic procedure need be followed by the trial judge, *People v. Keenan,* 185 Colo. 317, 524 P.2d 604 (1974), a guilty plea cannot stand as voluntarily and knowingly entered unless the defendant understands the nature of the crime charged. *People v. Brown,* 187 Colo. 244, 529 P.2d 1338 (1974). This requirement is not met "unless the critical elements of the crime charged are explained in terms which are understandable to the defendant." *People v. Cumby,* 178 Colo. 31, 495 P.2d 223 (1972). However, unless the language of the charge is highly technical, no "more full explanation of the substantive crime could be given than the charge itself." *People v. Pauldino,* 187 Colo. 61, 528 P.2d 384 (1974). When defendant's attorney has explained his rights and the elements of the charge, "the trial judge could properly assume that the defendant understood the consequences of his act." *People v. Gorniak,* 197 Colo. 289, 593 P.2d 349 (1979).

At Ball's 1973 providency hearing, the trial court explained the elements of second degree burglary even

though defensel counsel waived the reading of the information. Ball acknowledged that he had discussed the guilty plea with his attorney, and that he understood what he was doing. While it is true that the trial court did not explain the elements of theft or the requirement that the intent to commit theft must exist at the time of entry, "intent" and "theft" are not technical terms which would require extensive definition. *Pauldino, supra.* There is sufficient evidence in the record to support the trial court's findings during the providency hearing that Ball understood the elements of second degree burglary.

III.

Ball asserts that the evidence was insufficient to support the jury's finding that the defendant was identified as the person convicted of assault with a deadly weapon in the Jefferson County District Court on July 16, 1973. We disagree.

The identity of the defendant as the person convicted of the prior felony must be proved by the prosecution beyond a reasonable doubt. Section 16-13-103(4)(b), C.R.S. 1973 (1981 Cum. Supp.). The test for sufficiency is "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *People v. Bennett,* 183 Colo. 125, 515 P.2d 466 (1973).

On April 27, 1973, Ball pled guilty to second degree burglary in Denver District Court, and judgment was entered on July 2, 1973 (count 1). On May 7, 1973, Ball pled guilty to assault with a deadly weapon in Jefferson Coun-

ty District Court, and judgment was entered on July 16, 1973 (count 4). In order to establish count 4, the People introduced certified copies of the information and the mittimus. The sentence specified in the mittimus is "not less than one, nor more than five years (said sentence to run consecutively with the term defendant is now serving out of the Denver District Court.)" Two photographs of the defendant and a set of his fingerprints are attached to this mittimus. The number 41882 is stamped on the photographs and written on the mittimus.

The prosecution presented evidence that the pictures and fingerprints were taken in connection with the Denver case, and the number was the register number assigned to the Denver case by the penitentiary. The record supervisor from the penitentiary testified that if an inmate receives a second mittimus while he is incarcerated, the new mittimus will be assigned the same number. He further stated that certain procedures are followed by the penitentiary to avoid any possible confusion between inmates with the same name. We conclude that this evidence, considered as a whole, is sufficient to support the jury's identification of the defendant as the subject of the July 16 judgment.

IV.

The defendant's final contention is that he was prejudiced by the jury's exposure to certain evidence of prior crimes other than those charged in counts 1 through 4. We disagree.

Although it is necessary under the habitual criminal statutes to prove prior convictions, earlier charges are irrelevant and should not be admitted. *People v. Reed,*

42 Colo. App. 275, 598 P.2d 148 (1979). However, the defendant's reliance on *People v. Lucero,* — Colo. —, 615 P.2d 660 (1980) is misplaced. In that case, the defendant's prior criminality was interjected into the case throughout the trial. Here, it is unlikely that the jury could have deciphered the encoded references to certain crimes, such as "B con t/c B; L con t/c L; Rec. con t/c Rec." Moreover, the prosecutor and defense counsel examined the exhibits prior to trial and agreed on certain deletions. Defense counsel did not object to the admission of the exhibits as modified. We conclude that the defendant did not suffer any prejudice, and there was no reversible error. *See People v. Montoya,* — Colo. App. —, 640 P.2d 234 (1981).

The judgment of conviction is affirmed.

CHIEF JUDGE ENOCH and JUDGE VAN CISE concur.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-K-1963

RICHARD LEE BALL,

Plaintiff,

vs

JAMES G. RICKETTS, Executive Director
of the Department of Corrections,

Defendant.

RECOMMENDATION BY
UNITED STATES MAGISTRATE

Richard Lee Ball, an inmate of the Colorado Department of Corrections, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 against James G. Ricketts, Executive Director of the Department of Corrections. The plaintiff alleges that his constitutional rights were violated because he did not enter into a voluntary plea of guilty to a charge of burglary before the Denver District Court in 1957. He further alleges that the Denver District Court did not have jurisdiction of the case.

Pursuant to Rule 17 of the Local Rules of Practice of the United States District Court for the District of Colorado, Magistrate Donald E. Abram heard oral argument by counsel who have stipulated to the facts in the case. As agreed by both parties, the transcripts of the proceedings constitute all of the facts to be determined

by the court. The Magistrate enters his following findings of fact, conclusions of law and recommended order.

In 1957, the petitioner at 16 years of age was arrested and charged with six felony charges along with three other defendants. He was placed in the Denver County Jail and remained there for nine days before he was arraigned with the other defendants in the District Court in and for the County of Denver, Colorado. Two of the other defendants were represented by attorneys. At the request of their counsel, the date for the taking of the plea was continued. The petitioner was then called before the Judge without counsel and without his parents being present. After the court explained the petitioner's right to talk to any attorney, the court read only the first charge of the six count information. The petitioner entered a plea of guilty. None of the other counts were read to him. He subsequently was sentenced to the reformatory at Buena Vista, although this was his first conviction. All of the remaining defendants later entered pleas through counsel and were placed on probation.

The petitioner later was convicted of being a habitual criminal in the Jefferson County District Court and sentenced to life in prison. One of the felonies used in the Jefferson County District Court, for purposes of establishing that the petitioner was a habitual criminal, was the 1957 conviction in the Denver County District Court.

JUDICIAL REVIEW

In reviewing the decision of the state court, the factual findings are presumed correct unless the facts are not supported by the record. *Sumner vs Mata,* 449 U.S.

539, 549 (1980); *Sumner vs Mata*, 455 U.S. 591, 597-598 (1982). The factual determination must be given a "high measure deference" which means that the state court's findings "lacked even fair support of the record." *Marshall vs Lonberger*, 103 S.Ct. 843, 74 L.Ed.2d 646, 657 (1983).

The difficulty with this case is that all of the state court opinions fail to enter any findings as to the critical factual issues. Further, the trial court judges fail to cite any legal basis for their conclusions.

JURISDICTION

The issue of the jurisdiction of the Denver District Court will first be addressed. Colorado was the second state to provide a special juvenile court system in the United States. In 1903, the Juvenile Delinquency Law was established. A Juvenile Court was established in Denver County, Colorado in 1907. The Juvenile Court had "co-ordinate" jurisdiction with the District Court and County Court in any criminal case involving a person under 21 years of age and had exclusive jurisdiction of neglected, dependent or delinquent children. It also had exclusive jurisdiction of other proceedings such as adoptions and custody and disposition of children. C.R.S. 37-9-2 (1953). The delinquency statute applied to children under 18 years of age. A definition of delinquency sets forth a series of acts which would not be crimes if committed by an adult but are acts of juvenile delinquency if committed by a person under 18 years of age. C.R.S. § 22-8-1 (1953). These are now known as "status offenses." *Standards for Juvenile Justice: A Summary and Analysis.* p. 5.

When a felony was committed by a person 18 years of age or younger, the prosecutor could file a petition under the juvenile act or an adult information. C.R.S. § 22-8-7 (1953) specifically provides "when necessary, in cases where the delinquency charges would otherwise constitute a felony, the court may direct such child to be kept in proper custody until an information or complaint may be filed as in other cases under the state law." In 1967, the legislature adopted the Children's Code which gave exclusive jurisdiction to the juvenile courts for children 18 years of age or under, with few exceptions for both criminal acts and status offenses. *Maddox vs People,* 178 Colo. 366, 497 P.2d 1263 (1972).

The argument that the Denver District Court did not have jurisdiction is in error. The Denver District Court had coordinate jurisdiction with the juvenile court to hear the felony charges against the petitioner.

VOLUNTARY PLEA

The transcripts of various proceedings establish the following facts as being undisputed. The petitioner had failed third and fifth grades. He was passed from eighth to tenth grade because he was to [*sic*] old for ninth grade and junior high school. He had just entered the tenth grade in September of 1957 when he was arrested and charged with a six count felony information. He was sixteen years of and [*sic*] and not living with his parents. He [*sic*] parents had not been informed that he had been arrested or that he was being arraigned before the Denver District Court. Prior to the arraignment, he had been in an adult facility, the Denver County Jail, for nine days without being informed of any of the charges against him and without

seeing his parents. He had only one prior offense. His uncle, not a parent, had him plea no contest to a charge in the municipal court and he had been placed on probation. There is no evidence to show that he was a sophisticated juvenile delinquent, but a sixteen year old boy with multiple family and educational problems. With this background, he was given jailhouse advice by adult prisoners before the arraignment that "they probably wouldn't do anything but give me probation."

A person who enters into a plea of guilty waives three basic constitutional rights:

1. A right to remain silent.
2. The right to a jury trial.
3. The right to confront his accusers.

McCarty vs United States, 394 U.S. 459, 466 (1968); *Boykin vs Alabama,* 395 U.S. 238, 243 (1968). In the case of *In re Gault,* 387 U.S. 1, 42-56 (1966), the court applied the same rights to a juvenile defendant.

The transcript of the arraignment establishes that the petitioner was not, at anytime, advised of his right against self-incrimination by the trial judge.

Another issue is whether the petitioner has sufficient understanding of the nature of the charge so as to enter into a voluntary plea. There were six counts to the information. The Judge read only the first count, and the petitioner was never informed of the remaining counts. There is no evidence that until the arraignment the petitioner had ever been informed of any other charges pending against him. The court record does not reflect the disposition of any of the remaining charges. Prior to

reading the first count in the information, the court never informed the petitioner that there were six counts in the information. The record only reflects that the petitioner was handed a copy of the information and he was asked to read along with the Judge.

The court never inquired as to whether the petitioner could read, let alone understand the awkward and tortured legal wording of the burglary charge in the first count. The court never inquired as to the petitioner's educational background. The court further did not inquire as to why the parents were not present. The court simply read the wording in the information. The elements of the crime were not broken down into language capable of understanding by an adult layman, let along [*sic*] a sixteen year child who appeared for the first time in a Denver District Court without his parents, a lawyer and had minimal education.

The Jefferson County District Judge, during the habitual criminal case, denied the motion of defense counsel to strike the 1957 conviction. The defense counsel directed to the Jefferson County District Judge's attention that Ball was sixteen at the time of the 1957 plea. The court ignored that fact and stated "assuming that the transcript was correct, the defendant was seventeen" and then went on to state his opinion. The court found that the defendant said he understood "the things" that the judge advised him of. The transcript of the proceedings does not substantiate that finding of fact. The arraigning judge asked whether the petitioner understood he had the right to see an attorney, and that the judge had the right to sentence him to the state reformatory. The judge at

no time asked the petitioner whether he understood the charge against him. The judge after reading the charges simply stated "Now the charge is burglary. How do you want to plead?" When defense counsel asked the Jefferson County District Judge to clarify his findings, the Judge states "in this case, the Judge read the information to him. The elements were contained in the information, but there were—I can't find in this transcript that there was a full advisement as to what each of the elements were and what the people had to prove. The only thing that I can find is that the court—that there was the first count in burglary, was read and that was it. There's no indication that this defendant didn't know what he was doing at the time he was aked [*sic*] specific questions and gave definite answers. I would say that he was at the time properly advised before the plea of guilty was accepted by the court." The court is correct in its findings that the elements of the charge were never explained to the petitioner. What the Jefferson County District Judge missed in his findings was that the petitioner was never asked whether he understood the charge.

In the subsequent Rule 35 proceedings, the Denver District Judge found that the elements of the charge of burglary were not explained to the petitioner. The court recognized "that there are a lot of words that are probably foreign to a person who is not learned in the law." The Denver District Judge did not comment on the failure of the arraigning judge to inquire whether the petitioner understood the charge at the time he entered the plea. The court stated "I think it met with the standards that were present at that time. * * * The court is aware that the elements were not explained to the defendant at that time;

under the rule, it apparently wasn't something that was required. *I think* the only requirement at that time, was whether *he understood what he was charged with,* and the consequences of his plea." The court then fails to consider the fact that the petitioner was never asked whether he understood the charge before entering the plea and that no inquiry was made by the arraigning judge as to ability of the petitioner to understand the plea.

Neither the Jefferson County District Court Judge or the Denver District Judge in the Rule 35 proceedings cite any law. The most notable expression was "I think" the law was at the time of the arraignment different than it was at the time of the Rule 35 proceedings.

Where an essential constitutional right is at stake, the court cannot presume that the defendant waived an essential right from a silent record. *Boykin vs Alabama,* 395 U.S. at 242-243; *Carnley vs Cochran,* 369 U.S. 506, 516 (1961). The record is clear that the petitioners [*sic*] did not waive his basic right to remain silent or waive the right to be fully advised of the charges and to understand those charges before he plead guilty. As is stated in *McCarty vs United States, supra* at pages 455-467

> "These two purposes have their genises [*sic*] in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against self-incrimination, his right to a jury trial and his right to confront his accusers. For this wavier [*sic*] to be valid under the Due Process Clause, it must be an "intentional relinquishment or abandonment of a known right or privilege. *Johnson vs Zerbst,* 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in vio-

> lation of due process and it is, therefore, void. Moreover, because a guilty plea is an admission of all of the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

Explanation of the elements of the offense is particularly essential where the court has a child of sixteen without parent or an adult to guide him. In *Henderson vs Morgan*, 426 U.S. 637 (1975), the court had before it a nineteen year old who was substantially below average in intelligence but who was represented by counsel. The elements of the crime were not read to him. The court reversed the conviction stating "nevertheless, such a plea cannot support a judgment of guilt unless it is voluntary in a constitutional sense. Clearly the plea could not be voluntary in the sence [*sic*] that it constituted an intelligent admission that he committed the offense unless the defendant received real notice of the true nature of the charge against, the first and most universally recognized requirement of due process." *id.*, 645.

Where the court is dealing with a young defendant who is not present with his parents, an adult or with any attorney, it is essential that the court determine the ability of the defendant to understand the charge and how the facts relate to that charge before accepting a plea of guilty. *Rinehart vs Brewer*, 561 F.2d 126, 131 (8th Cir. 1977).

A determination as to whether there has been a voluntary waiver of his rights by the petitioner must be determined by the totality of the circumstances. In 1957, children were treated as adults both for the purposes of pretrial investigation, detention, trial and commitment.

As a result, the courts have carefully looked at many factors to determine whether a juvenile voluntarily gave up constitutional rights. The procedures of the Denver Police and the Denver District have already been reviewed and found wanting in similar circumstances. In *Gallegos vs Colorado,* 370 U.S. 49 (1961), a fourteen year old boy was arrested for robbing an elderly man. He was held for five days in the Denver Juvenile Hall without a lawyer or seeing his parents. He was questioned by the Denver Police and confessed to the crime. That confession was later used to convict him of murder. The state court found no constitutional violation. The court stated:

> The prosecution says that the youth and immaturity of the petitioner and the five day detention are irrelevent, because the basic ingredients of the confession came tumbling out soon after he was arrested. But if we took that position, it would, with all deference, be in callous disregard of the boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or a friend could have given the protection his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a fourteen year old boy would not be able to know, let alone assert, such constitutional rights he had. To allow this conviction to stand would, in effect, be to treat him as he had no constitutional rights. There is no guide in decision of cases such

> as this, except the totality of the circumstances that bare [*sic*] on the two factors mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure to immediately bring him before the judge of the juvenile court, the failure to see to it that he had the advice of lawyers or a friend —all of these combined to make a conclusion that the formal confession on which this conviction may have rested (see *Payne vs Arkansas,* 356 U.S. 560, 568) was obtained in violation of due process."

There have been similar decisions in *Hailey vs Oklahoma,* 332 U.S. 596 (1947) and *Rinehart vs Brewer, supra.* The Supreme Court in *In re Gault, supra,* went so far as to require both the *child and the parent* must be given notice of the charges and the right to counsel. *In re Gault,* 387 U.S. at page 31 and 41.

We must recognize that a plea of guilty is the ultimate confession, for it is the confession of guilt that finalizes the conviction of the defendant. *Boykin vs Alabama,* 395 U.S. 238, 242 (1968). Totality of the facts in this case establish that the state courts failed to consider all of the facts in finding the petitioner voluntarily waived his right to counsel and voluntarily entered a plea of guilty. Their findings have ignored the following: his age, the fact that he had been kept in jail without seeing counsel or his parents for nine days, that no inquiry was made as to his eduation or mental ability to understand the charges against him, that no attempt was made to insure that his parents had been properly notified of the charges, and that their son was in court, and more importantly that no inquiry was ever made of the petitioner as to whether he understood the charge or the elements of the charge in the information. Further, none of the state court judges

attempted to arrive at any conclusion of law. They failed to apply or consider the facts in relation to the plaintiffs federal constitutional rights.

The Magistrate finds that the petitioner did not voluntarily waive his constitutional rights to remain silent, to be represented by an attorney or to fully understand the charges against him. The state courts findings of fact lack fair support of the record. The state court findings further have failed to apply the proper federal constitutional law to the facts.

IT IS HEREBY RECOMMENDED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 be granted.

FURTHER, IT IS ORDERED that under Rule 17 of the Local Rules of Practice of the United States District Court for the District of Colorado, the parties shall have ten (10) days after the service hereof to serve and file any written objections in order to obtain reconsideration by the Honorable John L. Kane, Jr., District Judge to whom this case is assigned.

DATED at Denver, Colorado this 27th day of July, 1983.

BY THE COURT:

/s/ D. E. Abram
United States Magistrate

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-K-1963

RICHARD LEE BALL,

Petitioner,

vs

JAMES G. RICKETTS, Executive Director,
Colorado Department of Corrections,

Respondent.

RECOMMENDATION BY
UNITED STATES MAGISTRATE

The Magistrate entered his findings of fact and conclusions of law with recommended order on July 28, 1983. The respondent has filed a petition for reconsideration of the Magistrate's recommendations. The matter has been, pursuant to court order, referred to the Magistrate to consider two additional issues. The Magistrate was directed to review the probation document submitted with the petition for reconsideration and to consider the 1973 conviction as to sufficiency of evidence. The Magistrate heard argument of counsel on September 9, 1983, and enters his following findings of fact, conclusions of law and recommended order.

1973 CONVICTION

The petitioner, Richard Ball, argues that there was never a proper identification of Mr. Ball as the person convicted of a felony in the Jefferson County District Court on July 16, 1973 and therefore, the conviction should not have been used at the time of the habitual criminal trial. Exhibit CC is the mittimus of the July 16, 1973 conviction and sentence. It sets forth that the sentence is to run concurrently with the Denver District Court sentence of July 2, 1973. The petitioner had been sentenced by the Denver District Court on July 2, 1973 and transferred to the Colorado State Penitentiary to commence serving his sentence. Photographs and fingerprints were taken on July 2, 1973 and the petitioner was given a prisoner number of 41882. He was then taken to the Jefferson County District Court in Golden, Colorado, for a plea and sentence on July 16, 1973. He was then immediately returned to the Colorado State Penitentiary to serve a concurrent sentence. It is obvious that the penitentiary, rather than repeating the photographing and fingerprinting which had just been completed fourteen days before, simply attached a copy of the fingerprints and photos taken at the time the petitioner entered the penitentiary on July 2, 1973 to the mittimus of the July 16th conviction. As testified by Mr. Pittman of the State Penitentiary, a prisoner has the same number although he may have several convictions. The names on both mittimusses were the same. Evidence at the trial established the petitioner was the person convicted in the Denver District Court on July 2, 1983 [*sic*].

Reviewing the evidence in the light most favorable to the prosecution, the evidence is sufficient so that any

rational prior fact could have found that the petitioner, Richard L. Ball, was the same Richard Ball who was convicted on July 6 [*sic*], 1973 and July 2, 1973. *Jackson vs Virginia,* 443 U.S. 307, 316-320 (1979); *Sanders/Miller vs Logan,* United States Court of Appeals, Tenth Circuit no. 80-2123 dated June 13, 1983 (unpublished).

PROBATION REPORT

The state argues that the evidence not previously reviewed by the Magistrate which consists of a probation report to the 1957 trial judge, establishes that the petitioner had sufficient knowledge of the charges so has to constitute a voluntary plea. The portion of the 1957 probation report has been submitted. In the report, the petitioner admits the facts of the crime to the probation officer doing the presentence report. The probation report was not a part of the court file and was not reviewed by the Magistrate at the time he made his initial recommendations. It also apparently was not reviewed by the trial judge at the Rule 35 proceedings or at the habitual criminal trial since there is no mention of such facts in the transcript.

The state is making the assumption that the court read the report prior to the sentence since it is not part of the court record. This would be consistent with the procedure as set forth by C.R.S. § 39-7-8 (1953). This section only requires that the criminal be informed of the consequences of the plea. It further requires that court prior to the sentencing, examine witnesses for purposes of aggravation and mitigation. The submission of a probation report is sufficient to meet the last requirement

without testimony. *Little vs People,* 138 Colo. 572, 335 P.2d 863 (1959); *Williams vs People,* 135 Colo. 580, 307 P.2d 466 (1957). The probation report further indicates that the parents knew the son was being held in jail but decided to leave him there to teach him a lesson.

The state argues that admissions made to the probation officer and the history of the petitioner being involved in other burglaries, establishes knowledge on the part of the petitioner of the charge to which he pleaded guilty. The state relies on *Smith vs O'Grady,* 312 U.S. 329 (1941) as the controlling law. The Colorado Supreme Court in relying on *Smith vs O'Grady,* reaffirmed that a guilty plea must be voluntary and understood by the defendant in order to establish constitutional requirements. *People vs Meyers,* 617 P.2d 808, 814 (Colo. 1981). The court stated:

> "In the fact of a silent record, it was incumbent upon the prosecution to demonstrate by considerably greater evidence than present here that the defendant's guilty plea was knowingly made. See *People vs Randolff,* 175 Colo. 454, 488 P.2d 303 (1971); *Erickson, An Overview of the ABA Standards,* 12 Amer. Crim. L. Rev. 277, 290-294 (1974); *Erickson, The Finality of Plea of Guilty,* 48 Notre Dame Lawyer. 835 (1973).
>
> Moreover, the parties stipulated that when the defendant plead guilty, the court did not advise him of elements of the offense. The awareness by the accused of the general nature of the offense is no substitute for an actual notice of the true nature against him—the first and most universally recognized requirement of due process. *Smith vs O'Grady,* 312 U.S. 329, 334 * * * The facial invalidity of the guilty plea taken without judicial advisement to the

> accused of the elements of the offense is patent and such defect rendered any conviction thereon constitutionally inadmissible in the trial of this case." p. 815.

A mere reading of the charge is not sufficient to establish knowledge on the part of the alleged defendant. As stated in *Silver vs Crisp,* 644 F.2d 807, 809-810 (10th Cir. 1981), "The United States District Court for the District of Montana held on an early occasion, that if neither the court nor his attorney explained to a state prisoner the difference between 1st and 2nd degree burglary, his plea would be involuntary based on ignorance. A mere reading of the charge would not suffice, absent an explanation to the defendant on or off the record, of the law in relation to the facts. *Jones vs Montana,* 235 F. Supp. 673, 677-679 (D.Montana 1964). Ball was not represented by counsel and the court did not explain the charge. He was not advised either on or off the record of the nature of the charge or whether he understood the charge.

I am not persuaded by the argument of the state's counsel that the probation report cures the defect at the time of the entry of the plea. There is still no evidence as a matter of record that the petitioner has acknowledged before any court, either at the time of his sentence or subsequently in Rule 35 Proceedings, that he had any knowledge of the actual crime for which he was being charged and entered a plea. The probation reports in the files indicate that the petitioner has, since age 16, been continually in trouble with the law. As a result, he has spent most of his adult life in a prison setting. The court should not and cannot permit this knowledge to affect

the decision as to whether the petitioner's constitutional rights were violated at the time of his first felony conviction.

IT IS HEREBY RECOMMENDED that the petitioner's request to set aside the use of the July 16, 1973, conviction in the habeas corpus proceedings should be DENIED.

IT IS FURTHER RECOMMENDED that the petition for writ of habeas corpus be GRANTED as to the petitioner's conviction in 1976.

DATED at Denver, Colorado this 24th day of October, 1983.

BEFORE THIS COURT:

/s/ D. E. Abram
United States Magistrate

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 82-K-1963

RICHARD LEE BALL,

Petitioner,

vs.

JAMES G. RICKETTS, etc.,

Respondent.

O R D E R

KANE, J.

On July 28, 1983 the United States Magistrate issued a detailed recommendation concerning this petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The essential question presented is whether, at the age of 16 in 1957, the petitioner entered a knowing and voluntary plea of guilty to a charge of burglary. If he did then his subsequent conviction for being an habitual criminal is valid. If he did not, that habitual criminal conviction must be set aside. The magistrate, himself a former state district judge, found that the petitioner did not waive his constitutional rights to remain silent, to be represented by an attorney or to understand fully the charges against him. He further found that the state court findings failed to apply the correct federal constitutional standards to the facts.

Because of my extreme reluctance to interfere with the processes of state criminal cases and because the respondent filed objections to the magistrate's findings and recommendations, after oral argument I remanded the case to the magistrate for further consideration in light of the objections made. After further considerate review, the magistrate again recommended granting the writ. In essence, the magistrate says the 16-year old defendant was not represented by counsel and the court did not explain the charge. Further, the defendant was not asked whether he understood the charge.

Further objections to the second recommendation were filed by the respondent, so I again set the case for oral argument. Somewhat astonishing to me, counsel for both petitioner and respondent appeared at oral argument and advised that each had nothing to say. Accordingly, I set about, once again, to review the entire file. I have come to the same conclusion as the magistrate. Accordingly,

IT IS ORDERED that the recommendation of the United States Magistrate is approved and made an order of court.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus is granted.

DATED at Denver, Colorado this 20th day of December, 1983.

/s/ John L. Kane, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

RICHARD LEE BALL,

Petitioner-Appellee,

v.

JAMES G. RICKETTS, Executive Director, Colorado Department of Correction, Canon City, Colorado,

Respondent-Appellant.

No. 83-2662

United States Court Of Appeals,
Tenth Circuit.
Dec. 16, 1985

Maureen Phelan, Assistant Attorney General (Duane Woodard, Attorney General, Charles B. Howe, Deputy Attorney General, Richard H. Forman, Solicitor General, with her on the brief), Denver, Colorado, for Respondent-Appellant.

James England, University of Colorado, Boulder, Colorado, for Petitioner-Appellee.

Before McKAY and LOGAN, Circuit Judges, and RUSSELL, District Judge.*

LOGAN, Circuit Judge.

The State of Colorado appeals from the district court's grant of a writ of habeas corpus setting aside petitioner Richard Lee Ball's conviction as a habitual criminal. Ball was sentenced to life in prison under Colorado's habitual criminal statute, which requires such a sentence for persons convicted of a felony who already have three previous felony convictions. *See* Colo. Rev. Stat. § 16-13-101(2). At Ball's trial on the habitual criminal charge, the state presented evidence of four prior felonies; the jury found that Ball had committed three of them including a burglary to which he pleaded guilty in 1957 in Colorado state court.

Ball was sixteen years old at the time he entered that 1957 plea, although he told that court he was seventeen. He had no lawyer, having declined the court's offer to appoint counsel. He also told the court that his parents knew he was in jail; this may not have been true. Based on these circumstances, the transcript of the exchange between Ball and the Colorado trial judge who took his 1957 plea, and Ball's current testimony that he did not understand the charges and the court procedures at the time he pleaded guilty, Ball contends his conviction was invalid. He asserts that his guilty plea was involuntary and his waiver of counsel ineffective.

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*Honorable David L. Russell, United States District Judge for the District of Oklahoma, sitting by designation.

It is important to emphasize the limited scope of federal court review here. In *Sumner v. Mata*, 449 U.S. 539 (1981), and 455 U.S. 591 (1982), the Supreme Court clearly intended to give substance to 28 U.S.C. § 2254(d)'s command that a federal habeas court presume a state court's determination made after a hearing on the merits of a factual issue to be correct, unless the petitioner meets one of the narrow exceptions provided in the statute. The magistrate in this case considered *Mata* inapplicable because he found that "all of the state court opinions fail to enter any findings as to the critical factual issues." R.I, 23. This statement is incorrect. The Colorado state district court, in the 1980 postconviction proceeding in which petitioner sought to attack this conviction collaterally, held an evidentiary hearing during which it heard testimony from Ball. After that hearing it made factual findings, ruling that petitioner: (1) understood what was going on in the court at the time he entered a plea of guilty; (2) understood the nature of the burglary charge even though the elements of burglary were not explained to him; and (3) understood the consequences of his plea. R. IIB, ¶ 242-44. These state court findings are no less viable because they were delivered from the bench and transcribed rather than issued in written opinion form. *See Wainwright v. Witt*, — U.S. —, —, 105 S.Ct. 844, 851, 83 L.Ed.2d 841 (U.S. 1985). The Colorado appellate court affirmed these findings and found that petitioner was competent to waive his right to counsel, had effectively waived that right, and had not pleaded guilty involuntarily. R. I, 5-7.

Both sets of findings contain elements of pure legal questions of federal constitutional law, which we may reconsider freely, *see Marshall v. Lonberger*, 459 U.S. 422,

431 (1983); *Mata,* 455 U.S. at 597 & n.10, and underlying questions of historical fact and inferences therefrom, which we must accept as true unless one of § 2254(d)'s exceptions applies, *Lonberger,* 459 U.S. at 431-32, 103 S.Ct. at 849-50. *See generally Chaney v. Brown,* 730 F.2d 1334, 1346 (10th Cir.), *cert. denied,* — U.S. —, 105 S.Ct. 601, 83 L.Ed.2d 710 (U.S. 1984).

The ultimate constitutional questions raised in this appeal are whether Ball's rights to procedural due process as a juvenile were satisfied, whether his waiver of counsel was effective, and whether his guilty plea was voluntary. The legal standards applied to these questions are not subject to § 2254(d). *See, e.g., Lonberger,* 459 U.S. at 431, 103 S.Ct. at 849; *Brewer v. Williams,* 430 U.S. 387, 403, 97 S.Ct. 1232, 1241, 51 L.Ed.2d 424 (1977). Therefore the federal habeas court must independently evaluate the constitutional standards the state courts applied to ascertain whether they were correct, and then apply the correct standards to the factual findings of the state court. *Cf. Mata,* 455 U.S. at 597, 10 [*sic*] S.Ct. at 1306 (describing this process of review for a challenge of improper pretrial photographic identification). This process of limited review may not be ignored, even though it requires some distinctions not amenable to abstract description.

Were it not for Ball's age at the time of the disputed guilty plea we would have little trouble finding that the state court's determinations must be upheld. But special procedural protections are constitutionally required when children are charged with criminal offenses. Nothing in the record in this case indicates that state or local officials contacted Ball's parents to tell them their son was

in jail or to inform them of his arraignment hearing. Ball testified, twenty-three years later, that he had not informed his parents of his arrest because of his fear of their anger and the costs they would incur. R. IIB, ¶ 207-09, 214. We realize that Ball told the state court judge conducting his arraignment that his parents knew he was in jail; but he also told the judge that they were taking no steps to get him out or to obtain an attorney for him. *See* R. IIC, 6-7. Ball also told the the judge he was seventeen when he was actually only sixteen; nevertheless, the judge still considered him a minor. *Id.* at 4. The state judge made special efforts to help petitioner understand his rights, and we understand, given the state of the law in 1957, how the state court failed to take further precautions to protect the juvenile's interests.

Nevertheless, in *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Supreme Court held that due process requires notice in writing to a juvenile "and his parents" of the specific charge at the earliest practicable time and in any event in advance of the initial hearing. *Id.* at 33, 87 S.Ct. at 1446. *Gault* also requires giving the child and his parents notice of the juvenile's right to counsel. *Id.* at 41,[1] 87 S.Ct. at 1451. The rights recognized in *Gault* have been applied retroactively in a variety of settings because they affect the integrity of the truth-finding process. *See Heryford v. Parker*, 396 F.2d 393, 396-97 (10th Cir. 1968) (juvenile's right to counsel in involuntary commitment proceeding applied retroactively); *see*

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[1] The right of parents to notice of their child's arrest was codified in Colorado after *Gault*. *See* Colo. Rev. Stat. § 19-2-102(1); *see also* 18 U.S.C. § 5033 (analogous duty of federal officials to notify parents).

also United States v. Slipka, 735 F.2d 1064, 1066 (8th Cir. 1984) (juvenile's right to counsel in juvenile delinquency adjudications applied retroactively); *Kemplen v. Maryland,* 428 F.2d 169, 175-77 (4th Cir. 1970) (juvenile's right to counsel and notice in juvenile jurisdiction waiver proceeding applied retroactively). We hold that the right of parents to receive adequate notice is one of the rights that should be extended retroactively to cases such as the one before us.

Consequently, despite the deference we owe to the state courts' factual findings at the 1980 hearing and the appeal therefrom, we conclude that they applied an incorrect standard of federal law to the facts before them. The lack of notice to Ball's parents is a sufficient ground to vacate the 1957 guilty plea. Once the Colorado courts had ascertained in 1980 that Ball's parents were never contacted, they should have set aside the conviction. In view of the rule in *Gault,* it was not enough for the state court conducting the 1957 arraignment to have asked petitioner whether his parents knew he was in jail and whether they were taking steps to get him out or to get him an attorney, and to have accepted his answer as true. Had officials notified Ball's parents of his arrest, it seems likely the parents would have taken some action to assist him. Thus, the lack of such notice here may well have affected the ultimate outcome of the case. We are not under any illusions that Ball was as unknowledgeable as the juvenile whose guilty plea was held to be involuntary in *Rinehart v. Brewer,* 561 F.2d 126, 130-31 (8th Cir. 1977). Nor do we fault the state for failing in 1957 to apply a rule that did not yet exist. But the rights to parental

notice that *Gault* created are not waivable by a juvenile offender.[2]

AFFIRMED.

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[2] Although Ball's counsel has not specifically focused his legal arguments to either the federal or the state courts on the specific right to parental notice, we nevertheless consider this claim to have been fairly presented to the state courts. Therefore further exhaustion of state remedies is not appropriate. *Gault* was cited by both Ball and the State of Colorado in their briefs throughout the postconviction proceedings. It also is cited in the Colorado Court of Appeals decision denying relief.

APPENDIX F

JANUARY TERM—March 4, 1986

No. 83-2662

Before Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges, and Honorable David L. Russell*

RICHARD LEE BALL,

Petitioner-Appellee,

v.

JAMES G. RICKETTS, Executive Director, Colorado Department of Correction,

Respondent-Appellant.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied. Judge David L. Russell would grant rehearing.

/s/ Howard K. Phillips, Clerk

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* United States District Judge for the Western District of Oklahoma, sitting by designation.

APPENDIX G

28 U.S.C. § 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, un-

less the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant.

otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the suffiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (As amended Nov. 2, 1966, Pub.L. 89-711, § 2. 80 Stat. 1105.)

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No. 85-1982

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHASE RIVELAND, Executive Director, Colorado Department of Corrections,

Petitioner,

v.

RICHARD LEE BALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES ENGLAND
Counsel for Respondent

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3968

QUESTION PRESENTED FOR REVIEW

Should this Court review the correctness of the Tenth Circuit's decision invalidating a guilty plea entered in 1957 by a sixteen-year-old boy, without counsel, and without notification or presence of his parents?

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioner herein (who was the Respondent in the District Court below, and the Appellant in the Tenth Circuit below) will be referred to as the State or as the prosecution. Respondent (who was the Petitioner in the District Court below, and the Appellee in the Tenth Circuit below) will be referred to by name.

STATEMENT OF THE FACTS

I. 1957 GUILTY PLEA HEARING

At issue in this case is the constitutional defectiveness of a guilty plea entered in state court in 1957 when Mr. Ball was 16 years old. Despite his age, Mr. Ball appeared in adult court, not juvenile court.[1] He was not represented by an attorney, and

1. In trial court and appellate proceedings below in the state courts, Mr. Ball also challenged the 1957 court's jurisdiction. The basis of this challenge was the Colorado statute in effect in 1957 giving the state's county courts, except in certain cases not applicable here, jurisdiction over all criminal cases against minors. Colo. Rev. Stat. § 37-8-1. This challenge was rejected by the Denver District Court and the Colorado Court of Appeals. It was rejected by the United States Magistrate, even though it had not been raised in Mr. Ball's habeas petition.

his parents were not present.

The information filed against Mr. Ball contained six charges--burglary, theft, theft by receiving, and three counts of conspiracy. All these charges pertained to a single incident alleged to have occurred on September 21, 1957. Mr. Ball, along with three co-defendants, was arrested that day and held in the Denver Jail.

Nine days later, Mr. Ball, along with his three co-defendants, appeared in the Denver District Court for arraignment. (The transcript of this hearing is attached as Appendix 1.) Two of the three co-defendants were represented by attorneys, and their cases were continued at the attorneys' requests.

The court advised Mr. Ball that he had a right to a "postponement, if you want, to give you some short time within which to talk to a lawyer," and asked if he wanted to talk to a lawyer before being arraigned. Mr. Ball replied, "No, sir." The court then stated its understanding that Mr. Ball was aware of his right to talk with a lawyer but that he "simply" did not want to do so. Mr. Ball replied, "Yes, sir." The court again stated that Mr. Ball could talk to a lawyer before being arraigned, "and you do not desire to do that, is that correct?" Mr. Ball again responded, "Yes, sir." Finally, the court stated:

> I don't want to talk you out of it, but I want to make certain that you understand clearly what the issue is. I have a duty under the statutes to appoint counsel if you are indigent. But as I understand it, you want to go ahead and be arraigned right now, is that correct?

Mr. Ball again responded, "Yes, sir." The court then provided Mr. Ball with a copy of the six-count information against him,[2] and stated:

---

2. Only the one charge of burglary was discussed in the plea-advisement proceedings, with the record not indicating the disposition of the other five charges, as the Magistrate below found.

> Now, you may or may not know that the first count charges you with burglary. I am going to read the charge to you, and you might want to follow me as I read. The charge is that Richard Lee Ball, on September 21, 1957, at Denver, Colorado, the office, shop and storehouse there situate of George W. Caughren, doing business as Barnum Creamery, then and there feloniously, burglariously, willfully, maliciously and forcibly did break and enter, and feloniously, burglariously, willfully and maliciously without force did enter, with intent, the moneys, goods and chattels of the said George W. Caughren, doing business as Barnum Creamery, in the said office, shop and storehouse, then and there being, then and there feloniously and burglariously to steal, take and carry away.
>
> Now the charge is burglary. How do you want to plead?
>
> DEFENDANT BALL: Guilty, sir.

Without any further advisement or inquiry of any kind concerning this charge, other than the possible penalty, the court then accepted the guilty plea.

II. SUMMARY OF THE PROCEEDINGS BELOW

A. State Court Proceedings

1. Jefferson County District Court

Mr. Ball was charged in 1978 in the Jefferson County (Colorado) District Court with several charges of theft and conspiracy, and five allegations that he had been previously convicted of separate felonies. These allegations were brought pursuant to Colorado's "habitual criminal" statute, which requires, upon conviction for a substantive felony offense, a life sentence if the defendant is found by the trier of fact to have been three times previously convicted of "separately brought and tried" felonies, and a sentence from 25 to 50 years if the defendant is found to have been twice so previously convicted. Colo. Rev. Stat. § 16-13-101 (Appendix 2).

One of the five alleged prior convictions was dismissed before trial in 1979. In the middle of a jury trial, Mr. Ball withdrew his not guilty plea and pled guilty to three charges of

theft and one of conspiracy. Jury trial then continued as to the habitual-criminal allegations.

Before trial began, Mr. Ball's attorney moved to dismiss the allegation pertaining to the 1957 Denver conviction, alleging the constitutional defectiveness of the guilty-plea proceeding.[3] The trial court considered the transcript of that proceeding, but conducted no evidentiary hearing. It denied the motion to dismiss, finding that although the Denver court in 1957 had not explained every element of the offense and had not done anything other than read the first count of the information, "[t]here's no indication that this defendant didn't know what he was doing at the time he was asked specific questions and gave specific

The jury found that Mr. Ball had not been identified as having been convicted of one of the alleged prior felonies, but found that he had been previously convicted of the other three alleged felonies, including the 1957 Denver conviction. Mr. Ball was later sentenced to life imprisonment, and initiated an appeal of his habitual-criminal adjudication in the Colorado Court of Appeals.

2. Denver County District Court

While this appeal was pending, Mr. Ball filed a motion pursuant to Colorado's post-conviction procedures, Colo. Crim. P. 35(c), in the Denver District Court, challenging the constitutional defectiveness of the 1957 conviction in that court. The trial court conducted an evidentiary hearing, at which Mr. Ball was the only witness.

Mr. Ball testified that at the time of the plea he was a 16-year-old high-school student, who had previously failed two grades and had been "skipped" past the ninth grade because he was

3. Also the subject of motions to dismiss were the other two alleged convictions. These motions were denied, and were not the subject of any federal-court proceedings. answers."

too old to continue in junior high. He had previously pled "nolo contendere" in a prior municipal court case, in which he was not represented by an attorney.

Prior to his arrest in 1957, he had left home to avoid further beatings from his father, and spent part of the time sleeping in the park. He did not call his parents to let them know he had been arrested, because he was "afraid the court would make them pay for whatever I was concerned in."

Mr. Ball also testified that he had not talked to his parents or to an attorney during the nine days he spent in jail before appearing in court. He did not understand the terms used in court, such as "arraignment," and did not know the difference between a felony and a misdemeanor. He thought "indigent" meant "like a wino," and did not really understand it. He testified that he was "afraid to ask for a lawyer or tell them that I wanted to talk to one."

He had not read the charge against him before being handed a copy of the information in court, and could not read along as it was being read aloud because of his poor reading ability. He testified that he did not understand what the court read to him, did not understand the words used in the charge, did not understand the charge itself, and did not know its requisite elements.

Finally, Mr. Ball testified that he lied about his age when he was in court by saying that he was 17 instead of 16, because "one of the co-defendants was a girlfriend and I had been telling her...that I was a year older than I was, and I didn't want to admit to her I was younger."

At this hearing, the prosecution conducted no cross-examination, and did not ask Mr. Ball a single question.

The Denver court denied any relief, stating that even though

the elements of burglary were not explained, it would find that he did understand "what was going on in the court" and the nature of the charge. An appeal was also initiated from this order, and consolidated with the prior appeal in the Colorado Court of Appeals.

3. Colorado Court of Appeals

On appeal, the Colorado Court of Appeals in 1982 affirmed the holdings of both the Denver and Jefferson County District Courts. It held that Mr. Ball had validly waived an attorney, and that "the applicable requirements for a voluntary guilty plea were met." (Appendix A of the Petition for Writ of Certiorari.) Mr. Ball petitioned the Colorado Supreme Court for a writ of certiorari, which was denied.

B. Federal Court Proceedings

1. Inicial Proceedings

Mr. Ball next filed a petition in 1982 for a writ of habeas corpus in the United States District Court in Colorado. The prosecution responded to the Court's Order to Show Cause with an Answer, claiming that no federal constitutional issue existed because the state appeallate court's decision had "hinged" upon questions of fact. The District Court assigned the case to a United States Magistrate for discovery and other pretrial proceedings.

In December of 1982, the Magistrate issued an order setting a discovery and settlement conference. Counsel for both Mr. Ball and the prosecution jointly filed a response to this order, stating their agreement that the case be decided on the basis of the record developed in the state court proceedings, and their agreement "that no further evidentiary hearing is needed."

In January of 1983, the Magistrate inquired whether the case could be decided on the basis of the already-compiled state court record. On February 23, 1983, counsel for the prosecution sent

Mr. Ball's counsel a letter stating in part:

> We have decided that all of the papers filed in this case so far make it abundantly clear that there is no factual dispute not resolved in the state courts.... A decision can be and should be made on the petition, the answer to show cause order and the supporting documents.

Later that month, both parties reaffirmed this agreement at a status conference, which resulted in the Magistrate ordering transmission of the state court records. Oral arguments were held before the Magistrate the next month.

2. Magistrate's Recommendations and District Court Proceedings

On July 27, 1983, the United States Magistrate issued lengthy written findings and a recommendation that Mr. Ball's habeas petition be granted. (Petitioner's Appendix B.) The Magistrate's findings concerned the "historical" facts surrounding the 1957 guilty-plea proceeding. He found, for instance, that when Mr. Ball appeared in court in 1957, he was "a sixteen year old boy with multiple family and educational problems." He also expressly referred to the findings which had been made by the state trial courts as discussed above, but noted that "all of the state court opinions fail to enter any findings as to the critical factual issues."

The Magistrate specifically found that, prior to his arraignment, Mr. Ball had not been informed of the charges against him, and that his parents had not been informed that he had been arrested or that he was being arraigned. He further found that the state courts had ignored the lack of any attempt "to insure that his parents had been properly notified of the charges, and that their son was in court." Citing In re Gault, 387 U.S. 1, 31, 41 (1966), the Magistrate noted that both a child and the parent must be given notice of the charges and the right to counsel.

The Magistrate also found that the court in 1957 did not inquire into Mr. Ball's ability to read, his educational background, the reason for his parents' absence, or his ability to understand either the charge against him or the plea he offered. Specifically, the Magistrate found that Mr. Ball was never asked whether he understood the charge against him at any point in the plea proceedings.

From these findings, the Magistrate concluded that Mr. Ball had not waived his right "to be fully advised of the charges and to understand those charges before he plead guilty." The Magistrate also found that Mr. Ball had not voluntarily waived his right to be represented by an attorney.

In response to the Magistrate's findings and recommendations, the prosecution filed lengthy written objections. It did not request an evidentiary hearing, or any opportunity to present any additional information. Appended to the prosecution's objections, however, was six pages of a purported "probation report." This report had never been part of the record at any stage of any of the prior proceedings.[4]

Counsel for Mr. Ball then filed a response objecting to any consideration of such material not part of the record. In arguments before the United States District Court, counsel for the prosecution agreed to withdraw the never-before presented "probation report." The District Court then remanded the case back to the Magistrate for consideration of an issue raised in Mr. Ball's petition that had not been addressed in the findings and recommendation,[5] and for consideration of a two-page

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4. The prosecution's objections did not mention that this report was not part of the record. Counsel for the prosecution later claimed to have been unaware of this fact.

5. This issue, concerning the sufficiency of evidence in Mr. Ball's 1978 trial, was not the subject of any proceedings before the Tenth Circuit.

"Application for Probation." This two-page document, unlike the six-page "report," had been a part of the record since the post-conviction proceedings in the Denver trial court, but had not been specifically referred to by the Magistrate.

After remand and additional oral arguments, the Magistrate issued additional written findings and conclusions of law, and again recommended that Mr. Ball's petition be granted. (Petitioner's Appendix C.) Apparently the Magistrate considered not only the two-page probation application but also the six-page probation report which the prosecution had already agreed would be withdrawn from consideration. The Magistrate again found that the court in 1957 did not explain the charge and that Mr. Ball was then neither advised "on or off the record of the nature of the charge" nor asked if he understood it. The Magistrate found further that post-plea admissions in the "Application for Probation" did not cure the plea proceeding defects, since there was still no evidence that Mr. Ball had at any time acknowledged before any court that he had any knowledge of the actual crime of burglary.

The prosecution again filed written objections, but again did not request any opportunity to present additional evidence. The District Court provided an opportunity for oral arguments, but the prosecution declined to present any.

On December 20, 1983, the United States District Court issued an order granting Mr. Ball's habeas petition, and approving the Magistrate's recommendation. (Petitioner's Appendix D.) In so doing, the Court noted its "extreme reluctance to interfere with the process of state criminal cases."

The prosecution then initiated an appeal of this order.

Despite the order granting Mr. Ball a writ of habeas corpus,

the State of Colorado continued to hold Mr. Ball in custody and refused to release him without a specific order from the District Court. Counsel for Mr. Ball then filed a motion for his enlargement upon bond pending the prosecution's appeal, pursuant to Fed. R. App. Proc. 23(c). The prosecution opposed this motion generally, but did not suggest any alternatives to outright release. The District Court ordered Mr. Ball's release on a $20,000.00 co-signed appearance bond.

3. Tenth Circuit Proceedings

The prosecution filed a Docketing Statement in the Tenth Circuit Court of Appeals, setting forth the "questions presented" as being whether the District Court had properly determined that Mr. Ball's 1957 guilty plea was entered involuntarily, and, specifically, whether the Magistrate was correct "in refusing to consider evidence contained in the 1957 probation report."

After briefing and arguments, on December 16, 1985, the Tenth Circuit issued an opinion affirming the grant of habeas corpus. (Petitioner's Appendix E.) This opinion did not expressly reach the conclusions of law reached by the Magistrate and affirmed and adopted by the District Court. Instead, it noted the "special procedural protections [which] are constitutionally required when children are charged with criminal offenses," and the lack of any indications that state or local officials had contacted Mr. Ball's parents to tell them that their son was in jail or to inform them of his arraignment hearing. The Tenth Circuit then held that despite the deference owed state court's findings, here those courts had incorrectly applied federal law to the facts before them by not invalidating Mr. Ball's plea because of the lack of parental notification.

Again the prosecution filed written objections in the form of a Petition for Rehearing, and now for the first time requested an evidentiary hearing. Attached to the petition was a portion

of the same six-page "probation report," still not part of the record, which the prosecution had earlier withdrawn from any judicial consideration. The prosecution claimed this material showed that Mr. Ball's parents had somehow and at some time been notified of their son's arrest. The prosecution did not claim to have any evidence that his parents had been notified of their son's court date, or had received the constitutionally-required written notification of the charges against him.

The Tenth Circuit denied the petition for rehearing, and the prosecution then petitioned for certiorari.

III. MR. BALL'S CURRENT STATUS

The Petition for Writ of Certiorari notes at page 7 that Mr. Ball has accumulated several new cases since his release on bond pending appeal. Counsel has personally investigated this situation and has obtained copies of the following state-court felony charges now pending against Mr. Ball:

Adams County - Second-Degree Burglary, Conspiracy to Commit Second-Degree Burglary (two counts).

Arapahoe County - First case: Second-Degree Burglary;
Second case: Aggravated Robbery, First-Degree Burglary, Second-Degree Burglary, Theft.

Denver County - First case: Second-Degree Burglary, Theft;
Second case: Possession of Heroin.

Jefferson County - First case: Second-Degree Burglary (three counts), Attempted Second-Degree Burglary (two counts);
Second case: Second-Degree Burglary, Theft;
Third case: Second-Degree Burglary, Aggravated Robbery.

In addition to all these charges, habitual-offender charges have also been filed against Mr. Ball in both Arapahoe County cases, in the second Denver County case and in all three Jefferson County cases. Eight prior convictions are alleged in the Arapahoe and Denver County cases, and five prior convictions are alleged in the Jefferson County cases. The 1957 conviction

is one of the alleged prior convictions in Arapahoe and Denver counties, but not in Jefferson County. At least two of the prior convictions have already been found constitutional by state courts. Alleged in all three counties are the convictions resulting from Mr. Ball's mid-trial counselled guilty pleas in Jefferson County in 1979 discussed above.

In Colorado, a finding of two prior convictions results in imprisonment from 25 to 50 years, and a finding of three or more prior convictions results in life imprisonment. Colo. Rev. Stat. § 16-13-101. A life sentence in Colorado renders a defendant ineligible for parole for a minimum of 40 calendar years. Colorado laws permit life sentences to be imposed consecutively. If Mr. Ball was found guilty of any felony in each of the seven Arapahoe, Denver and Jefferson County cases, and found to have at least three prior convictions, he could receive seven consecutive life sentences, making him ineligible for parole for 280 years.

As of this date, Mr. Ball is in custody in Arapahoe County, and his cases there have been set for trial in August and September of 1986.

ARGUMENT

I. THE STATE OF COLORADO IS NOT NOW ENTITLED TO AN EVIDENTIARY HEARING, WHERE IT HAD NEVER SOUGHT SUCH A HEARING BEFORE RECEIVING AN UNFAVORABLE OPINION FROM THE TENTH CIRCUIT COURT OF APPEALS.

A central focus of the State's petition is its assertion that it has been denied a "full and fair" opportunity "to present available evidence," and that the Tenth Circuit's opinion must be reversed so that the State may now be provided an evidentiary hearing.

In the seven years since Mr. Ball's conviction as a habitual criminal, the first time the State sought an evidentiary hearing was in its Petition for Rehearing in the Tenth Circuit.

The State did not attempt to present any evidence whatsoever at the evidentiary hearing, held at Mr. Ball's request, in the Denver District Court. In fact, the State did not even ask Mr. Ball a single question in cross-examination at that hearing.

The State did not request an evidentiary hearing in the "pretrial proceedings" before the United State Magistrate. In fact, the State expressly agreed then that no further evidentiary hearing was needed.

The State did not request an evidentiary hearing after the Magistrate issued his initial findings, which included findings about the lack of parental notification. In fact, the State later agreed that the Court would not consider the documents, on which it now still relies, that have never been part of any record.

The State did not request an evidentiary hearing after the Magistrate issued his second set of findings, affirming the earlier findings. In fact, the State did not present any oral arguments before the District Court when given the opportunity to

do so.

Instead, the State's first mention of any kind of any need for an evidentiary hearing came when it received an unfavorable ruling from the Tenth Circuit. But even this 11th-hour claim was unaccompanied by any suggestion whatsoever of what additional relevant evidence it would seek to present at such a hearing. See, Battie v. Estelle, 655 F.2d 692, fn. 24 at 703 (5th Cir. 1981): "But even assuming that a party is otherwise entitled to supplement the record in a habeas action at this late date, the State has not offered to show any specific facts that contradict the present record."

Even the six-page probation report (the admissibility of which is open to grave doubts given its completely hearsay nature), which the State alternately relies upon and then withdraws from consideration, would not provide any significant additions. At most, this report only indicates that Mr. Ball's parents were notified of their son's presence in jail, at some unspecified point after his arrest, and from some unidentified source. The State's reliance on this point, moreover, is manifestly misplaced, as a similar contention was expressly rejected in Gault itself. "Mrs. Gault's 'knowledge' of the charge against Gerald, and/or the asserted failure to object, does not excuse the lack of adequate notice." In re Gault, supra, 387 U.S. at 34, fn. 54.

Finally, the transcript of the 1957 plea (which the State stipulated below would constitute the factual record in this case, along with Mr. Ball's uncontradicted testimony at the state-court evidentiary hearing) establishes that the constitutionally-required prior written notice could not have been provided to the parents, for Mr. Ball himself received a written copy of the charges for the first time at the arraignment hearing, only minutes before pleading guilty.

Having deliberately bypassed so many opportunities for an evidentiary hearing, and now still unable to point to any additional evidence it would present, the State has shown no need or entitlement to such relief.

II. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE GRANTING OF CERTIORARI.

In its Petition, the State of Colorado paraphrases the provisions of Supreme Court Rule 17.1 (a) and (c), but its claims boil down to asserting that the Tenth Circuit was erroneous and that it treated the State unfairly. This assertion, however, does not constitute any special or important reason why this particular case should be again reviewed, nor does it indicate why this case has any importance to the general public beyond the interests of the particular litigants. Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955).

In addition, the State's own failure to respond in a meaningful fashion to rebut Mr. Ball's claims in the numerous proceedings below belies any claims of unfairness in appellate proceedings.

It is also appropriate to examine the limited effect the opinion below will have on even the litigants themselves. Mr. Ball's liberty has proved to be of short duration, and he now is in considerable risk of incurring seven separate life sentences, potentially consecutive, pursuant to Colorado's habitual criminal statutes. This risk is entirely unaffected by the Tenth Circuit's determination that his one prior conviction was unconstitutionally obtained. Merely three prior convictions will subject him to these life sentences--he has been alleged to have as many as seven prior convictions, not counting the 1957 conviction. It will not enhance the sentences any further; its absence will not affect the upcoming habitual proceedings.

Finally, the State urges this Court to use this particular case to resolve definitively the question of what types of constitutional infirmities will render prior convictions unavailable for later penalty enhancement. Even ignoring this cases's lack of appropriateness as such a vehicle given its tangled and unique procedural evolution, this Court should not give much weight to this claim, where none of the State's argument as to this second issue at pages 12 through 15 was presented to the Tenth Circuit below.

The amici curiae, on the other hand, contend that certiorari must be granted to resolve division among the Circuits and the States as to the retroactive application of Gault. Yet no such significant conflict exists. Amici cite only two Federal Circuits--the Third and the District of Columbia--as holding that Gault "does not necessarily apply retroactively." (Amici Brief at 4.) The Third Circuit case cited, however, merely mentioned in dicta that this question had not yet been decided; a later Third Circuit case expressly noted that it had been conceded that uncounselled juvenile adjudications occurring before 1963 (obviously before Gault) were "thus constitutionally invalid." Del Piano v. United States, 575 F.2d 1066, 1067 (3rd Cir. 1978).

The District of Columbia Circuit opinion cited by Amici, Mordecai v. United States, 421 F.2d 1133 (D.C. Cir. 1969), did not hold that Gault was not retroactive. It instead held that the statutory holding in Kent v. United States, 383 U.S. 541 (1966), that a juvenile be afforded counsel at a hearing in which the juvenile court waives or transfers its jurisdiction to an adult criminal court, would not be applied retroactively. Similarly, all of the non-retroactive state-court opinions alluded to by the Amici, except Florida's, discuss retroactivity only in the context of the Kent jurisdictional-waiver hearing. None of these states other than Florida has held that the

procedural protections required by Gault in adjudicatory hearings are not retroactive.

The distinction is significant. In California, for example, a state cited as holding Gault non-retroactive, the Court of Appeals explained that this decision had concerned not Gault as much as it had Kent, and had been in the context only of initial preliminary hearings that would be followed by more procedurally rigorous proceedings. Examining instead "fully adjudicatory" juvenile proceedings, the California Court of Appeals indicated that Gault's protections would be retroactively applied, because the hearing was "the essential truth-finding process." In re J.D.W.B., 8 Cal. App. 3d 103, 87 Cal. Rptr. 178, 183 (1970).

Where, as here, the judicial proceeding involving the juvenile conclusively determines guilt or innocence, the claim that the absence of constitutionally-required procedural safeguards, such as counsel and adequate notice, will not bear on its reliability is without merit.

Moreover, any supposed conflict as to the retroactive effect of Gault is long over. Perhaps a consideration for certiorari in 1967 or 1968 or 1969, any controversy is long over. After all, there simply cannot be many, if any, former juveniles still incarcerated as a result of proceedings conducted more than nineteen years ago, before Gault was decided in 1967. Rather, the only possible party who could still be at all interested in Gault- retroactivity after all this time is the occasional adult defendant whose old pre-Gault, procedurally-defective proceedings continue to be used against him, as the basis for enhanced penalty, as in this case and in United States v. Slipka, 735 F.2d 1064 (8th Cir. 1984), or as impeachment, as in United States v. Rife, 514 F. Supp. 368 (S.D. Ohio 1981). That such occasions are few and far between can be seen by the mere handful of cases

discussing Gault retroactivity in the last fifteen years, and by the silent reaction given the Tenth Circuit's opinion in this case--no court citing it since its issuance (as of the most recently-published Shepherd's now available), no mention in the Criminal Law Reporter or any other similar reporting service to counsel's knowledge.

This case does not present a regularly recurring issue of present controversy and substantial public import. It is, rather, a virtual anachronism, a surviving relic of a branch of doctrine now all but extinct, whose interest is limited to the arcane and the abstract and whose effect is minimal even as to the parties themselves. It is not a worthy candidate for certiorari.

III. THE OPINIONS BELOW WERE CORRECT AND NEED NOT BE REVIEWED BY THIS COURT.

The Tenth Circuit was correct in finding that the manifest lack of the prior parental notice constitutionally required by Gault rendered the 1957 conviction constitutionally unavailable for post-Gault sentence enhancement. In focusing on the effect the lack of Gault protections have on "the integrity of the truth-finding process," the Tenth Circuit merely effectuated this Court's holdings such as Burgett v. Texas, 389 U.S. 109 (1967), invalidating sentence-enhancement use of prior uncounselled plea because such use would in effect renew the prior constitutional deprivation, and Gault itself.

Moreover, were this Court to review the Tenth Circuit's opinion, it would necessarily have to review the District Court's opinion (and the Magistrate's findings on which it was based) as well. The basis of this opinion is a fully adequate alternative ground for affirmance of the granting of habeas corpus relief.

While approving the Magistrate's findings, which included the finding as lack of parental notice, the District Court also

based its holding on the findings that there had been an inadequate determination that Mr. Ball understood the charge against him and that Mr. Ball had not validly waived his right to counsel.

These findings do not require rejection of any state-court factual findings. Their application to the facts in this case, such as Mr. Ball's age and educational difficulties, his lack of parental assistance or counsel's advice, and the "awkward and tortured legal wording of the burglary charge," was clearly correct, and based on correct application of the precedents of this Court.

Accordingly, certiorari is not appropriate even if there were any irregularity in the Tenth Circuit's opinion, as the District Court's opinion adequately supports the result as well.

CONCLUSION

There is no good reason why the opinion in this case, coming at the end of seven years of state and federal proceedings, and concerning the retroactivity of a case decided nineteen years ago, need be reviewed any further.

Respectfully submitted,

James England*
Counsel for Respondent
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(303) 442-3052

*Simultaneously with filing this Brief in Opposition, counsel is applying for admission to the Bar of this Court.

IN THE DISTRICT COURT IN AND FOR THE

CITY AND COUNTY OF DENVER AND

STATE OF COLORADO

Criminal Action No. 43849

RECEIVED
SEP 1957
CLERK, Court of Appeals

THE PEOPLE OF THE STATE OF COLORADO,	)	
	)	
vs.	)	REPORTER'S TRANSCRIPT
	)	
RICHARD LEE BALL and VICTORIA MARIE DeAGUERO and KENNETH RAY LITSEY and DARRELL KEENE,	)	Defendant Richard Lee Ball
Defendants.	)	

BE IT REMEMBERED that the above-entitled matter came duly on for hearing on Monday, September 30, 1957, before the HONORABLE ROBERT H. McWILLIAMS, JR., Judge of the District Court, Second Judicial District, presiding in Division 9 thereof.

A P P E A R A N C E S:

BERT KEATING, District Attorney, by MARVIN G. ROSENBAUM, Deputy District Attorney, appearing for the People.

MORTON L. COGGAN, Attorney at Law, appearing for Defendant Kenneth Ray Litsey.

ROLLIE R. ROGERS, ROBERT L. McDOUGAL and JOSEPH G. STUDHOLME, Attorneys at Law, appearing for Defendant Darrell Keene.

APPENDIX ONE

PROCEEDINGS

THE COURT: People versus Richard Lee Ball, Victoria Marie DeAguero, Kenneth Ray Litsey, and Darrell Keene.

Who is Richard Lee Ball?

DEFENDANT BALL: Me.

THE COURT: How old are you, Richard Lee Ball?

DEFENDANT BALL: Seventeen.

THE COURT: What?

DEFENDANT BALL: Seventeen.

THE COURT: Is anybody going to enter for Mr. Ball?

DEFENDANT BALL: No, sir.

THE COURT: Victor Marie DeAguero. Who is he?

DEPUTY SHERIFF: I have, that should be Victoria, your Honor.

THE COURT: Well, it is Victoria on the information. You are Victoria Marie DeAguero?

DEFENDANT DeAGUERO: Yes.

THE COURT: How old are you?

DEFENDANT DeAGUERO: Sixteen.

THE COURT: Sixteen?

DEFENDANT DeAGUERO: (Nods.)

THE COURT: Is anybody representing you?

DEFENDANT DeAGUERO: No, sir.

THE COURT: Kenneth Ray Litsey. Who is he?

DEFENDANT LITSEY: Me.

THE COURT: How old are you?

DEFENDANT LITSEY: Seventeen.

THE COURT: Is anybody going to enter for Mr. Litsey?

MR. COGGAN: I am representing Mr. Litsey, your Honor.

THE COURT: The name of Norton L. Coggan then is enter for the third named defendant, Litsey.

By the process of elimination, you are Darrell Keene?

DEFENDANT KEENE: Yes, sir.

THE COURT: Mr. Rogers?

MR. ROGERS: Your Honor, I want to enter my appearanc for Mr. Keene; also note the appearances of my associates, Robert L. McDougal and Joseph Studholme. We will represent Mr. Keene.

THE COURT: I think I will take up the ones who have counsel first. Is Mr. Litsey in jail or on bond?

MR. COGGAN: He's on bond, your Honor.

THE COURT: He's on bond at the present time?

MR. COGGAN: Yes, sir.

THE COURT: Now, the case is up for arraignment today. Is your client ready for arraignment at this time?

MR. COGGAN: No, your Honor. I have just been contacted today, and I would like a copy of the information, and would like a week for arraignment in this matter.

THE COURT: You may approach the bench, Mr. Coggan. The record should reflect that I have given Mr. Coggan a copy of the charges, and I simply ask that, Mr. Coggan, that you bring that back on your next court appearance, so we may utilize it for arraignment purposes.

Now, will one week's time be sufficient?

MR. COGGAN: Yes, sir.

THE COURT: I believe we will continue this until next Monday at 9:00 a.m., for pleading and setting. The bond heretofore entered into will remain in full force and effect, return-

able here a week from today, not in the afternoon session, but in the morning session of court.

Any questions, Mr. Coggan?

MR. COGGAN: I have another matter downstairs. I guess I can manage.

THE COURT: What court?

MR. COGGAN: Division 1 of the Municipal Court.

THE COURT: We can make this 2:00 in the afternoon. It makes no difference to us. Would you prefer to have it at 2:00 in the afternoon?

MR. COGGAN: Let's make it 2:00. Can we?

THE COURT: All right. It will be 2:00 o'clock.

Is Mr. Litsey in school, working, or neither one?

DEFENDANT LITSEY: No, sir. Unemployed.

MR. COGGAN: He is not in school or employed.

THE COURT: So it won't make any difference to him whether it is in the morning session or the afternoon session. He has lots of time.

MR. COGGAN: Let's set it for 2:00 o'clock.

THE COURT: All right, 2:00 o'clock. That's all. You are excused.

We will take up Defendant Keene. How old are you, Mr. Keene?

DEFENDANT KEENE: Seventeen.

THE COURT: Mr. Rogers, where do you stand on this matter of arraignment?

MR. ROGERS: I think, your Honor, I knew about the existence of the matter Friday or Saturday morning, but I would like time to check into it further, and I would like to have our

arraignment continued over until next week at the same time.

THE COURT: You may approach the bench, and I will g
you a copy of the information and simply ask that you bring it
with you when you reappear so we can utilize it for arraignment
Arraignment will be a week from today at 2:00 o'clock. Will th
be satisfactory to you?

MR. ROGERS: Your Honor, that's fine.

THE COURT: The notation insofar as the case against
Keene is concerned is that it is continued at the request of
Keene to the 7th of October at 2:00 o'clock, for arraignment.

Is he in jail or on bond?

MR. ROGERS: He's in jail, your Honor. That's one t
I wanted to call to your Honor's attention. I want to and in-
tend to file this afternoon, or early in the morning, a motion
to reduce, or for a P.R. bond. I think the facts, at least t
I know of them at this time, would justify your Honor's consid
ing that matter. This boy has never been in any trouble befo
and as a matter of fact in this particular case voluntarily
surrendered himself to the authorities when he thought he was
being sought. And he also has signed up and completed all the
steps to go in the Navy, except the actual induction part, an
he has to attend to those matters too. I can file a written
motion asking that your Honor consider that an rule promptly

THE COURT: Well, here's my policy on matters of th
type, Mr. Rogers. You may want to informally and unofficially
contact the District Attorney who is handling the case and fe
if they would acquiesce in your program. If there be agreeme
I probably will go along with the agreement on an informal mi
order basis. Now, if there be disagreement, then I simply

request that you file a written pleading and the written motion will be heard within 48 hours after it is filed. That's the rule that we will follow, if that be agreeable.

MR. ROGERS: Fine. We will go right ahead on that basis then.

THE COURT: We of course all realize that in the last analysis that is is my decision and not the District Attorney's. But if there be agreement, that is one thing; if there be disagreement, I will listen to each side and rule on the matter.

That's all then on the fourth named defendant, Keene.

Now, Richard Lee Ball, the case against you is up for arraignment. By that word, it is meant that if you are ready, I propose to read the charge to you.

DEFENDANT BALL: Yes, sir.

THE COURT: Now, it is my duty I think to advise you first that you have a right to a postponement, if you want, to give you some short time within which to talk to a lawyer.

Now, do you want to talk to a lawyer before you are arraigned in this matter?

DEFENDANT BALL: No, sir.

THE COURT: Mr. Ball, are your parents here in the courtroom perchance?

DEFENDANT BALL: No, sir.

THE COURT: Do you have parents here in Denver?

DEFENDANT BALL: Yes, sir.

THE COURT: Do they know that you are in jail?

DEFENDANT BALL: Yes, sir.

THE COURT: Are they taking any steps to get you out of jail, or get you an attorney?

DEFENDANT BALL: No, sir.

THE COURT: Because of your tender years, you are 17, I think the Court does have to proceed cautiously to make certain that you understand that you have a right to talk with a lawyer. Now, as I understood what you said up to now, you are aware of that fact, but you simply do not desire to talk to a lawyer, and you want to be arraigned right now. Is that the way you feel about the matter?

DEFENDANT BALL: Yes, sir.

THE COURT: Do you understand that you have got an inalienable right to talk to a lawyer and tell him your problem and follow his advice before you are arraigned, and you do not desire to do that, is that correct?

DEFENDANT BALL: Yes, sir.

THE COURT: I don't want to talk you out of it, but I want to make certain that you understand clearly what the issue is. I have a duty under the statutes to appoint counsel if you are indigent. But as I understand it, you want to go ahead and be arraigned right now, is that correct?

DEFENDANT BALL: Yes, sir.

THE COURT: You have thought it over. How long have you been in jail?

DEFENDANT BALL: Nine days.

THE COURT: Nine days? All right, we will arraign you then. That is your wish, correct?

DEFENDANT BALL: Yes, sir.

THE COURT: My clerk, for me, Mr. Richard Lee Ball, will hand to you two documents, the first document is a copy of the charge, and the second document is a copy of the jury list.

Now, you may or may not know that the first count charges you with burglary. I am going to read the charge to you and you might want to follow me as I read. The charge is that Richard Lee Ball, on September 21, 1957, at Denver, Colorado, the office, shop and storehouse there situate of George W. Caughren, doing business as Barnum Creamery, then and there feloniously, burglariously, wilfully, maliciously and forcibly did break and enter, and feloniously, burglariously, wilfully and maliciously without force did enter, with intent, the moneys goods and chattels of the said George W. Caughren, doing business as Barnum Creamery, in the said office, shop and storehouse, then and there being, then and there feloniously and burglariously to steal, take and carry away.

Now, the charge is burglary. How do you want to plead?

DEFENDANT BALL: Guilty, sir.

THE COURT: Now, before I can officially accept your tendered plea of guilty, I have to advise you of your rights, and warn you as to possible consequences of your proposed plea.

Now, I have already talked, I think in considerable detail, as to your most basic right, namely, to be represented by an attorney. And as I mentioned before, if you are without funds, I have the duty to appoint one at state expense.

You have a right to stand trial and let a jury of 12 of your equals listen to the evidence and determine your guilt or innocence.

You have a right to compel the attendance of witnesses who would testify ostensibly in your behalf. You have a right to have the witnesses who would appear against you cross-examined.

On your proposed plea of guilty, you subject yourself

to the possibility of a sentence to a penal institution. The law now reads that I would have the discretion on the one hand to commit you to the State Reformatory for an indeterminate term, and on the other hand, I could commit you to the State Penitentiary at Canon City, Colorado, and you could be kept there for not more than ten years nor less than one year.

Now, being advised and warned, do you still want to plead guilty to this charge of burglary?

DEFENDANT BALL: Yes, sir.

THE COURT: The plea is accepted.

Are you eligible or ineligible, or do you know, to apply for probation?

DEFENDANT BALL: I was on probation when they --

THE COURT: You were on probation? Out of what court?

DEFENDANT BALL: This court.

THE COURT: This court? This very courtroom?

DEFENDANT BALL: I think so.

THE COURT: Who was the judge who presided over your case?

DEFENDANT BALL: I don't remember.

THE COURT: I don't believe I did.

DEFENDANT BALL: No.

THE COURT: If you were eligible for probation, would you want to apply?

DEFENDANT BALL: Yes, sir.

THE COURT: I will enter an order granting you leave to apply for probation. If you are ineligible, certainly no harm will be done by permitting you to apply. The probation office will be over to see you Friday morning. They will take your

written application and they will want the answers to these questions which appear on that sheet of paper. You might spend some of your spare time in the interim preparing your answers.

Now, it will take them a month to complete their investigation. Accordingly, at this time I will continue this case as it relates to Ball to the 28th of October, at the hour of 9:00 o'clock a.m., at which time I desire, Mr. District Attorney, to hear evidence, and at which time I will rule on your application for probation.

Now, do you have any questions, Mr. Ball?

DEFENDANT BALL: No, sir.

THE COURT: That's all.

You are in jail, are you not?

DEFENDANT BALL: Yes, sir.

THE COURT: You may step back into the prisoner's box.

Now, Victoria Marie DeAguero, that is you?

DEFENDANT DeAGUERO: Yes, sir.

* * * * *

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, Otto Ulrich, do hereby certify that I am a Certifie Shorthand Reporter within and for the State of Colorado, Officia Reporter for the Second Judicial District of the District Court, at Denver, Colorado; that as such reporter, I was present upon the occasion of the proceedings conducted in the above-entitled matter, at the time and place as hereinabove set forth; that I stenographically recorded all proceedings had, and that the above and foregoing constitutes a true and correct transcript of my said shorthand notes, so taken as aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of January, 1979.

OTTO ULRICH

Subscribed and sworn to before me this 22 day of JANUARY, 1979.

Paul R. Davis
Notary Public

My Commission expires: My Commission expires December 7, 1980

(Colo. 1982); People v. Thompson, 655 P.2d 416 (Colo. 1982); People v. Pipkin, 655 P.2d 1360 (Colo. 1982); People v. Olds, 656 P.2d 705 (Colo. 1983); People v. Allen, 657 P.2d 447 (Colo. 1983); People v. Clements, 661 P.2d 267 (Colo. 1983); People v. Luciano, 662 P.2d 480 (Colo. 1983); People in Interest of P.J.N., 664 P.2d 245 (Colo. 1983).

Applied in People v. Rael, 198 Colo. 225, 597 P.2d 584 (1979); People v. Hight, 198 Colo. 299, 599 P.2d 885 (1979); People v. Jenkins, 198 Colo. 347, 599 P.2d 912 (1979); People v. Waggoner, 199 Colo. 450, 610 P.2d 106 (1980); People v. District Court, 623 P.2d 55 (Colo. 1981); People v. Torres, 625 P.2d 368 (Colo. 1981); People v. Boyd, 642 P.2d 1 (Colo. 1982); People v. Ray, 678 P.2d 1019 (Colo. 1984).

ARTICLE 13

Special Proceedings

PART 1

SENTENCING OF HABITUAL CRIMINALS

16-13-101. Punishment for habitual criminals.
16-13-102. Evidence of former convictions — identity.
16-13-103. Verdict of jury.

PART 2

SENTENCING OF SEX OFFENDERS

16-13-215. Diagnostic center as receiving center.
16-13-216. Powers and duties of the board.

PART 3

ABATEMENT OF PUBLIC NUISANCE

16-13-301. Definitions.
16-13-303. Class 1 public nuisance.
16-13-304. Class 2 public nuisance.
16-13-308. Temporary restraining order — preliminary injunction — when to issue.
16-13-309. Judgment — relief.
16-13-310. Redelivery of seized premises.
16-13-311. Disposition of seized personal property.
16-13-313. Fees — costs and fines — lien and collection.
16-13-314. Disposition of forfeited real property.

PART 5

COLORADO CONTRABAND FORFEITURE ACT

16-13-501. Short title.
16-13-502. Definitions.
16-13-503. Subject acts.
16-13-504. Forfeiture of vehicle, fixtures and contents of building, personal property, or contraband article — exceptions.
16-13-505. Forfeiture proceedings.
16-13-506. Final order — disposition of property.
16-13-507. Disposition of contraband article or property.
16-13-508. Forfeitures.

PART 1

SENTENCING OF HABITUAL CRIMINALS

16-13-101. Punishment for habitual criminals. (1) Every person convicted in this state of any felony for which the maximum penalty prescribed by law exceeds five years who, within ten years of the date of the commission of the said offense, has been twice previously convicted upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would

. a felony shall be adjudged an habitual c .minal and shall be punished by confinement in a correctional facility for a term of not less than twenty-five years nor more than fifty years.

(2) Every person convicted in this state of any felony, who has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony, shall be adjudged an habitual criminal and shall be punished by imprisonment in a correctional facility for the term of his or her natural life. Such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment or information. Nothing in this part 1 shall abrogate or affect the punishment by death in any and all crimes punishable by death on or after July 1, 1972.

Source: Amended, L. 79, p. 683, § 16; amended, L. 81, p. 948, § 1.

Law reviews.

For article, "Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike", see Colo. Law. 1225 (1982). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Colorado's Habitual Criminal Act: An Overview", see 12 Colo. Law. 215 (1983). For article, "Criminal Procedure", which discusses a recent Tenth Circuit decision dealing with double jeopardy and habitual criminal adjudications, see 61 Den. L.J. 299 (1984).

This section must be strictly construed.

The habitual criminal statute shall be narrowly construed in favor of the accused. People v. Nees, 200 Colo. 392, 615 P.2d 690 (1980).

The habitual criminal act does not create a new crime.

The habitual criminal statute does not define a substantive offense but relates to sentencing enhancement for the underlying felony. People v. Montoya, 640 P.2d 234 (Colo. App. 1981); People v. Watkins, 684 P.2d 234 (Colo. 1984).

Constitutional protection against double jeopardy applies to defendant prosecuted as habitual criminal. People v. Quintana, 634 P.2d 413 (Colo. 1981); People v. Mason, 643 P.2d 745 (Colo. 1982).

Section does not violate separation of powers. This section does not delegate to prosecutors the power to define criminal conduct, and thus does not run afoul of the constitutional limitations on separation of powers. People v. Gallegos, 644 P.2d 920 (Colo. 1982).

Nor does this section constitute cruel and unusual punishment.

In accord with original. See People v. Martinez, 689 P.2d 653 (Colo. App. 1984).

The absence of sentencing discretion, even when coupled with a prescribed life sentence, does not render subsection (2) of this section facially invalid as violative of the prohibition of cruel and unusual punishments in § 20 of art. II, Colo. Const. People v. Gutierrez, 622 P.2d 547 (Colo. 1981); People v. Hernandez, 686 P.2d 1325 (Colo. 1984).

The uniquely grave nature of the death penalty is the wellspring from which flows the constitutional requirement that mitigating factors be considered in sentencing notwithstanding the number or seriousness of a defendant's prior offenses. No such requirement is included within the Colorado constitution's prohibition of cruel and unusual punishments as applied to the sentencing of habitual criminals. People v. Gutierrez, 622 P.2d 547 (Colo. 1981); People v. Hernandez, 686 P.2d 1325 (Colo. 1984).

No denial of equal protection, etc.

In prescribing a specific inflexible sentence to life imprisonment for persons found to be habitual criminals on the basis of three prior felony convictions, while allowing various degrees of flexibility in sentencing other offenders, the legislature has not denied such habitual criminals the equal protection of the laws. People v. Gutierrez, 622 P.2d 547 (Colo. 1981); People v. Hernandez, 686 P.2d 1325 (Colo. 1984).

U.S. Supreme Court decision in Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed.2d 637 (1983), requires consideration of whether the lack of violence in convictions supporting a finding of habitual criminality is proportional to the life sentence imposed. People v. Hernandez, 686 P.2d 1325 (Colo. 1984).

CERTIFICATE OF SERVICE

I, James England, counsel of record for Respondent Richard Lee Ball, do hereby certify that on July 17th, 1986, I served a copy of the attached Brief in Opposition on counsel for Petitioner, and a copy on counsel for Amici Curiae, by depositing each in the United States Mail, postage prepaid, addressed as follows:

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No. 85-1982

In The
Supreme Court of the United States
October Term, 1985

CHASE RIVELAND, Executive Director,
Colorado Department of Corrections,

Petitioner,

v.

RICHARD LEE BALL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE

THE STATE OF IDAHO, JOINED BY ARIZONA, CONNECTICUT, DELAWARE, HAWAII, INDIANA, LOUISIANA, MISSISSIPPI, NEBRASKA, NEVADA, NORTH DAKOTA, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA and WISCONSIN

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QUESTIONS PRESENTED

May federal circuit courts circumvent the exhaustion requirement in habeas corpus cases, inject new issues, and deny a state an opportunity to present evidence and argument thereon, by merely citing a case which the parties had cited for a totally different proposition?

What type of infirmity renders a conviction so unreliable that it may not be used in a subsequent proceeding to enhance punishment?

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Pursuant to United States Supreme Court Rules 36.1 and 36.4 the above-listed states, through their Attorneys General, file this brief in support of the Petition for Writ of Certiorari filed by the Director of Corrections of the State of Colorado in *Riveland v. Ball,* No. 85-1982 (1985).

This case presents issues of importance to the criminal justice system of every state, involving as it does a belated collateral attack upon a twenty-eight-year-old conviction.

Respondent Ball is a state prisoner who petitioned successfully for a federal writ of habeas corpus. At sixteen years of age, Ball was convicted of robbery. That conviction was subsequently proffered in the present case, where respondent Ball was again convicted of robbery and, as an habitual criminal, sentenced to life imprisonment. The Tenth Circuit Court of Appeals affirmed the district court's order granting habeas relief. However, the Court of Appeals upheld the lower court by deciding an issue not addressed by the state court, the district court, or either of the parties. The court held that respondent's right to counsel and his parents' right to notice of the charges against him were unconstitutionally violated. *Ball v. Ricketts*, 779 F.2d 578 (10th Cir. 1985). The consequence of this conclusion was that the earlier robbery conviction was found to be an invalid predicate for the sentence enhancement imposed on Ball. To reach its holding the Court of Appeals held that *In Re Gault*, 387 U.S. 1 (1967), applied retroactively.

This case raises an issue central to the effective administration of state criminal justice systems. The limits set by this Court on the appropriate scope of federal review and supervision of state criminal proceedings will determine the extent to which limited state resources must be allocated to the process of federal collateral review. Every state has a strong interest in the way this Court reacts to Court of Appeals decisions expanding access to federal habeas courts.

———o———

STATEMENT

The Amici adopt and incorporate by reference the statement of facts set forth in the Director's Petition for a Writ of Certiorari.

———o———

SUMMARY OF ARGUMENT

The Court of Appeals held that the district court's order granting habeas relief would be affirmed. However, the court affirmed on grounds independent of those upon which the district court granted the petition. The Court of Appeals held (1) that *Gault* applied retroactively and thus respondent's parents' right to notice was violated, and (2) that the invalid conviction was improperly used to sentence Ball as an habitual criminal.

The following special and important reasons exist for granting a writ of certiorari:

a. The decision below conflicts with decisions of other Courts of Appeals and state courts of last resort.

b. The decision below has so far departed from the accepted and usual course of judicial proceedings that the circumstances call for an exercise of this Court's power of supervision.

———o———

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with Decisions of Other Courts of Appeals and State Courts of Last Resort.

This Court has not yet decided the question of prospective or retroactive application of *Gault*. The court below applied *Gault* retroactively to a conviction now twenty-eight years old.

The circuits are divided on the question. The Fourth, Eighth, Ninth, and Tenth Circuits have applied *Gault* retroactively. *Kemplen v. State of Maryland*, 428 F.2d 169 (4th Cir. 1970); *United States v. Slipka*, 735 F.2d 1064 (8th Cir. 1984); *Powell v. Hocker*, 453 F.2d 652 (9th Cir. 1971); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968). The Third and District of Columbia Circuits have held that *Gault* does not necessarily apply retroactively. *See, United States ex rel. Diggs v. Commonwealth of Pennsylvania*, 457 F.2d 933 (3rd Cir. 1972); *Mordecai v. United States*, 421 F.2d 1133 (D.C. Cir. 1969).

In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court held that the right to have illegally seized evidence suppressed did not apply retrospectively. The Court's decision was the result of balancing the advantages and disadvantages of applying a newly developed principle to previously final judgments:

> The accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. . . . [T]he Constitution neither prohibits nor requires retrospective effect. . . . [W]e must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. 381 U.S. at 628, 629.

The states are also divided. Arizona, California, Florida, Kentucky, Maryland, and Virginia have applied *Gault* prospectively. Indiana, Massachusetts, New Jersey, and Wisconsin have applied *Gault* retroactively. It is evident that in the absence of a clear mandate from the United States Supreme Court, this confusion will continue.

In *Stovall v. Denno,* 388 U.S. 293, 297 (1967), the Court established three criteria for evaluating retroactivity issues: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Considering these criteria, the Court held that the right to counsel during confrontation for identification purposes applied prospectively. 388 U.S. at 300. Although the Court acknowledged that past injustices could have been averted by the presence of counsel, especially strong countervailing interests prohibited retrospective application. The administration of criminal laws would have been disrupted and states would have been required to void the convictions of every person not represented by counsel during an identification procedure. The same concerns apply in the present case.

The purpose of *Gault* was to insure fair and judicious resolution of charges against juveniles. Retroactive application will not measurably advance this purpose. First, many past proceedings were accurate. Second, dissipation of memories, evidence, and witnesses would obstruct rather

than promote more accurate findings, even with notice and assistance of counsel.

The reliance factor of *Stovall* militates strongly against retroactivity. The pre-*Gault* juvenile system functioned in the posture of *parens patriae,* intentionally putting aside the technicalities of the criminal process that necessitate assistance of counsel.

The effect of the Court of Appeals' decision on the administration of justice would be entirely adverse. Likely, most proceedings before *Gault* violated some if not all of the *Gault* proscriptions. Thus, numerous decisions would be voided and the time and energy necessary to reopen cases for purposes of collateral attack would disserve the public interest and would further burden overcrowded court calendars. *See, e.g., Brumley v. Charles R. Denney Juvenile Center,* 466 P.2d 481 (Wash. 1970). Because retroactive application of a newly announced constitutional rule depends in part on the effect of the rule on the integrity of the truthfinding function in the trial court, *see, e.g. Stovall v. Denno, supra,* the decision of the Court of Appeals leaves a large logical gap. The Court of Appeals acknowledged that the right of notice at issue was that of Ball's parents:

> . . . the right of the parents to receive adequate notice is one of the rights that should be extended retroactively to cases such as the one before us. 779 F.2d at 581.

The decision of the Court of Appeals confers upon Ball an entitlement to habeas relief for the violation of a "right" that was not his own. In *Gault,* the Court explained that the notice requirement was intended to protect "a youth's

freedom and his *parents' right to his custody.*" 387 U.S. at 34. [Emphasis added.] Ball clearly had notice of the charges against him. Assuming that his parents did not have notice in time to protect the right to custody, this circumstance centers on an issue different from and entirely collateral to the issue of whether the truthfinding function of the trial court proceeding was compromised by the lack of notice to Ball's parents. It seems plain the decision of the Court of Appeals has no capacity to correct any conceivable defect in the factfinding processes entrusted to trial courts. For this reason there was no warrant to apply the principles of *Gault* to Ball's case, which occurred ten years prior.

Although the decision in *Gault* was retroactively applied, the new procedural rules it requires are foreign to juvenile court practices. *Gault* is substantially more revolutionary and far reaching than *Miranda v. Arizona,* 384 U.S. 436 (1966), which this Court held applicable prospectively in *Johnson v. New Jersey,* 384 U.S. 719 (1966). This Court in holding that *Miranda* applied prospectively explained: "*Miranda* . . . encompass[es] situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." 384 U.S. at 730. Other protections for the integrity of the truthfinding process exist and were afforded respondent in the conviction of which he complained. In such cases the Court has consistently applied new constitutional interpretations prospectively only. The right to counsel at preliminary hearings is not retroactive. *Adams v. Illinois,* 405 U.S. 278 (1972). The right to counsel under *Boykin v. Alabama,* 395 U.S. 238 (1969). is not retroactively applied. *Hart v. Risley,* 772 F.2d 911 (9th Cir. 1985). Moreover, the con-

cept of assistance of counsel is substantially different in the traditionally informal atmosphere of juvenile proceedings than in a criminal trial. *Brumley, supra.*

II. The Court Below Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings by Its Sua Sponte Holding That Gault Applies Retroactively That Its Decision Calls for an Exercise of This Court's Power of Supervision.

It has been settled for a century that exhaustion of state remedies is a prerequisite to federal habeas corpus. As a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act. *Ex Parte Royall,* 117 U.S. 241 (1886). *See* 28 U.S.C. § 2254. The exhaustion doctrine furthers the policy of comity. Adhering to this policy minimizes federal interference and disruption of state judicial proceedings. "It would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Rose v. Lundy,* 455 U.S. 509, 518 (1982).

28 U.S.C. § 2254(d) commands that the federal habeas court presume the state courts determined the facts correctly. This Court has held that federal review is of limited scope. *Sumner v. Mata,* 449 U.S. 539 (1981). By injecting new legal issues, the court below has deprived the state courts of a full and fair opportunity to litigate and decide the question.

In *Picard v. Connor,* 404 U.S. 270 (1971), this Court explained that it is not sufficient that a federal habeas

corpus applicant has been through the state courts. In *Picard,* the Court of Appeals, acknowledging that the defendant had not attacked his conviction on equal protection grounds, nonetheless held that the defendant had been denied equal protection of the laws. This Court found that the state courts could not be faulted for failing to consider a claim not asserted by the parties and held that the substance of the federal habeas corpus claim must first be presented to the state courts. *Ball* presents a comparable situation. Though both parties cited *Gault* in their briefs, no argument was presented in state court that *Gault* should be retroactively applied. Respondent's assertions were that his guilty plea was involuntary and that his waiver of counsel was ineffective. The record is devoid of any contentions about *Gault* rights or violations.

This Court has required "the federal courts to show a high measure of deference to the factfindings made by the state courts." 455 U.S. at 598.

The fundamental interest underlying the exhaustion doctrine and the related policy of federal-state comity is prevention of needless, unnecessary and time-consuming, piece-meal litigation. The court below itself noted: "It is important to emphasize the limited scope of federal court review here." 779 F.2d at 579. It is unfortunate that the Court of Appeals honored this principle only in the breach of it.

The result reached by the court below is inconsistent with the clear mandate of the Act and irreconcilable with this Court's decisions requiring exhaustion. The Colorado courts were denied an opportunity to consider the unexhausted issues on which the decision of the Court of Ap-

peals turned. As the petitioner's brief points out, had the federal courts honored the exhaustion rule it would probably have become clear that there was no factual basis for Ball's argument that his parents had no actual notice of his incarceration. Federal collateral review based on incorrect assumptions of fact, incomplete facts or no facts cannot be expected to be of any public benefit. The Court has appropriately pointed out that the exhaustion requirement encourages collateral review based on a full factual record. *Rose v. Lundy,* 455 U.S. 509 (1982). The Court should insist that the lower federal courts follow the rule.

—o—

CONCLUSION

This case affords this Court an opportunity to resolve a significant conflict.

The Court of Appeals' expansion of the availability of the writ of habeas corpus in federal courts is unnecessary and an unwarranted expansion of this Court's decisions. It lays the groundwork for greater and costlier intrusions into the law enforcement functions of state courts. Public confidence in the ability of both the federal and state judicial systems to uphold the law is undermined by the perception that criminal judgments entered in state courts are rarely final. Yet the extensive opportunities for federal collateral review result in relief in only the rarest cases, suggesting that much of such review is wasted effort. The conflict between state and federal institutions, intrinsic in the process of federal collateral review, is magnified by the failure of federal courts to give proper weight

to the rule requiring exhaustion of state remedies before federal relief may be pursued.

Respectfully submitted,

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